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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

Phil L. Hansen
Attorney General of Utah
Counsel for Plaintiff
236 State Capitol Building
Salt Lake City, Utah

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AUTHORITY CITED

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IN THE

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No. ....., Original

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

The State of Utah, by its Attorney General, respectfully requests leave of this Court to file the complaint submitted herewith against the United States of America.

Phil L. Hansen
Attorney General of Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah

PURPOSE OF MOTION

The motion for leave to file a complaint by the State of Utah against the United States of America is for the purpose of adjudicating the conflicting claims of said parties to certain lands around the Great Salt Lake which are located below the surveyed meander of the lake and which have been exposed as a result of the fluctuation and lowering of the waters of the lake. The United States of America has consented to be sued only by an original action in this Court.

STATEMENT IN SUPPORT OF MOTION

This is an action by the State of Utah against the United States of America, proposed to be instituted in this Court under authority of Article III, Section 2, Clause 2, of the Constitution of the United States. The United States of America has consented to be sued in this Court in this action by virtue of Section 5(b) of the Act of June 3, 1966, Public Law 89-441, 80 Stat. 192, as amended by Act of August 23, 1966 (Public Law 89-542). See Appendix at page 16. The purpose of the proposed action is to recognize and quiet the title of the State of Utah and to adjudicate and decree that the United States of America has no right, title, or interest in or to the exposed lands or minerals therein surrounding and constituting a part of the bed of the Great Salt Lake in the State of Utah and situated below the surveyed meander line of said lake.

The State of Utah claims that by virtue of its admission into the Union on January 4, 1896, on an equal footing with all other states of the Union, it

received title to the beds of all navigable lakes and rivers located within the State of Utah. The Great Salt Lake was at the date of statehood, at all times since has continued to be, and now is a navigable body of water. Since the date of statehood, the waters of the Great Salt Lake have fluctuated considerably and now are at an elevation lower than the surveyed meander line and also lower than the level of such waters at the date of statehood. Since the date of statehood, the State of Utah has claimed title to the exposed lands situated below the mean high water mark and has continually managed, administered, and developed said lands. The United States of America has recently asserted a claim of ownership to substantial portions of the exposed lands on the ground that such lands are reliction lands and that the common law doctrine of reliction would give title to said portions of the exposed lands to the United States of America as a riparian owner of lands upland and adjacent to the surveyed meander line of the lake.

In other words, the State of Utah believes the United States of America now claims those exposed lands situated between the present water level of the lake and the surveyed meander line in those areas where the United States of America owns the land situated above and adjacent to said meander line. Further, the State of Utah believes the United States of America now claims ownership of various portions of the exposed lands situated around the lake where the land immediately above the surveyed meander line has been patented to private individuals but where a portion of the land below the surveyed meander was exposed at the date of the patent.

The State of Utah contends that it has not been

divested of its ownership of the bed of the Great Salt Lake simply because the waters of said lake have fluctuated substantially from time to time. The State of Utah claims that such fluctuations are substantial, erratic, temporary, and have not been the result of any natural, gradual, and permanent lowering of the waters of the Great Salt Lake so as to result in a change of the mean high water mark. This is based in part on the fact that artificial and man-made diversions, impoundments, and consumptive uses on the tributaries of the Great Salt Lake have substantially caused the periodic fluctuations and lowering of the water level of the lake.

Therefore, the State of Utah rejects any claim by the United States of America that the common law of reliction is applicable to the exposed lands of the Great Salt Lake. The exposed lands simply are not reliction lands; consequently, that doctrine cannot apply under the facts of the proposed litigation. The Great Salt Lake is unique further in that it has no outlet and is an exceedingly shallow saucer or bowl representing a remnant of historic Lake Bonneville, and a slight change in vertical elevation of the lake's surface will expose or inundate many thousands of acres. The common law of reliction should not apply at all to the Great Salt Lake because of its extraordinary and unique nature, nor should it apply in any event because water fluctuations are erratic, temporary, and the result of man-made interferences with water flows of the tributary streams. Even if the doctrine of reliction were to apply, no claim by virtue of that doctrine successfully can be asserted below the mean high water mark of the Great Salt Lake as of January 4, 1896, when the State of Utah

was admitted into the Union. Until a preponderance of evidence to the contrary is introduced, the mean high water mark at the date of statehood is presumed to be the surveyed meander line.

The exposed lands in question are not known to have any significant inherent value. But the waters and brines of the Great Salt Lake have a very substantial mineral content. Many private corporations have demonstrated an interest in extracting and marketing minerals from the brines and have executed leases with the State of Utah.

The process of extracting the minerals in the brines requires the use of substantial areas of the exposed lands situated near the edge of the water. It is impossible for the lessee private corporations to obtain financing to expend huge sums of money when there is uncertainty of title as to who owns the exposed lands which have to be utilized for mineral extraction.

Until these title questions are clarified, the State of Utah is seriously and substantially hampered and frustrated in the development of the mineral industry around the Great Salt Lake. These factors caused Congress to enact Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542, a copy of which is attached as Appendix following the complaint at page 16, which gives the consent of the United States of America to be sued in this Court in this action and also provides generally for a means of administering these exposed lands pending determination of the title questions.

The original jurisdiction of this Court is invoked

because both the State of Utah and the United States of America claim title to the same land and because such claims by the United States of America are doing substantial and irreparable injury to the State of Utah, for which the State of Utah has no adequate remedy at law. Full and complete relief is possible only in this Court. It is exceedingly important to the State of Utah that this Court grant the motion for leave to file the complaint and order that the complaint be filed and that summons be served on the United States of America.

Phil L. Hansen
Attorney General of Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah

IN THE

Supreme Court of the United States

October Term, 1936

No. ....., Original

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant

COMPLAINT

The State of Utah, by its Attorney General, brings this suit in equity against the United States of America, and for its cause of action alleges:

I

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, and the United States of America has consented to be sued in this Court in this action by virtue of Public Law 89-411, 80 Stat. 192, as amended by Public Law 89-542.

II

The State of Utah owns certain lands, hereinafter more fully identified, in which the United States of America claims an ownership interest contrary and

opposed to the ownership of the State of Utah. Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542, granted the consent of the United States of America to be sued in this action to determine what interest, if any, the United States of America actually owned in and to said lands. Said act authorized the State of Utah either to purchase the ownership interest claimed by the United States of America or to maintain an original action in this Court to determine whether the United States of America actually had any ownership interest. The State of Utah has formally determined and elected to maintain this action in this Court.

III

The Great Salt Lake is a navigable body of water located wholly within the State of Utah. The Great Salt Lake was navigable on January 4, 1896, when the State of Utah was admitted into the Union of the United States of America; it has at all times since been navigable; and it now is a navigable body of water. The fact of navigability was recognized by Congress in the enactment of Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542. The fact of navigability has been recognized further by the United States of America in its claim to the lands which are the subject of the instant litigation. At the date of statehood, by virtue of its admission into the Union on an equal footing with all other states, the State of Utah became the owner in a sovereign and proprietary capacity of the beds of all navigable lakes and streams located within the State of Utah. Therefore, at the date of statehood, by virtue of its admission into the Union on an equal

footing with all other states, the State of Utah became the owner, has ever since been the owner, and now is the owner of the absolute right to the bed of the Great Salt Lake as delineated and determined by the official surveyed meander line of the Great Salt Lake, which meander line represents the mean high water mark of said lake as it existed at date of survey and as it existed at the date of statehood. The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined.

IV

The State of Utah has at all times since the date of statehood managed and administered the lands constituting the bed of the Great Salt Lake located below the surveyed meander line. The State of Utah has invested many millions of dollars in the development and improvement of much of the land constituting the bed of the Great Salt Lake. Further, the State of Utah has issued agricultural, mineral, and other leases covering much of said land. The unqualified ownership of the State of Utah in and to these lands has been generally recognized and undisputed. The United States of America itself has recognized such ownership in the State of Utah for more than 65 years. In fact, the United States of America itself has purchased from and paid the State of Utah for certain of the lands constituting a part of the bed of the Great Salt Lake. The United State of America first asserted in 1959 a claim to part of the land owned by the State of Utah located below the surveyed meander line of the Great Salt Lake and

constituting a part of the bed of the Great Salt Lake. The United States of America had fully recognized title in the State of Utah prior to that time. The State of Utah believes that the United States of America now claims to own approximately 436,000 acres of the bed of the Great Salt Lake. Since these lake bed lands are unsurveyed, it is not possible to describe by metes and bounds the land in dispute. However, said lands are generally identified on a map prepared by the United States of America which purports to show those areas which are claimed by the United States of America. Said map is marked Exhibit A, attached hereto, at pp. 14 and 15, and by this reference made a part of this complaint. The claim of ownership of these lands by the United States of America is adverse to the ownership of the State of Utah. In fact, the United States of America has no right, title, or interest in or to any of the lands illustrated in Exhibit A or to any other part of the bed of the Great Salt Lake as located below and within the surveyed meander line.

V

The State of Utah owns the minerals and brines included within the waters of the Great Salt Lake. Said minerals and brines have a substantial value if the same can be extracted, processed, and marketed. The State of Utah has issued a number of mineral leases to lessees who are able and anxious to establish a mineral industry around the Great Salt Lake. Such an industry is vitally important to the economy and interests of the State of Utah. This mineral development requires the use of the exposed portions of the bed of the Great Salt Lake for settling ponds and for other uses incidental to the min-

eral extraction industry. The mineral extraction industry cannot proceed until there is certainty of title as to the exposed portions of the bed of the Great Salt Lake. The exposed lands constituting a part of the bed of the Great Salt Lake have no significant inherent value, but they are vital to the State of Utah for use in connection with said mineral extraction from the waters and brines of the Great Salt Lake. The claims and actions of the United States of America have impaired, hampered, frustrated, and prevented the State of Utah and its lessees from proceeding with the mineral extraction industry; the claims and actions of the United States of America further have cast serious clouds on the water fowl management areas and other developed portions of the bed of the Great Salt Lake now owned and managed by the State of Utah; and the claims and actions of the United States of America still further have cast a cloud on the ownership of the State of Utah as to all portions of the bed of the Great Salt Lake illustrated in Exhibit A. The State of Utah has suffered irreparable injury as a result of said claims and actions by the United States of America and will continue to suffer irreparable injury until such claims and actions by the United States of America cease. The State of Utah has no adequate remedy at law.

WHEREFORE, plaintiff prays:

1. That a decree be entered by this Court quieting title in the State of Utah as against any and all claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest

whatsoever to any part of said land or minerals located ther in or any part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting any right, title, or interest in or to any of said land or minerals or any part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

2. That this Court appoint a master to hear and consider all admissible evidence relating to the claims of ownership and to make his findings and recommendations to this Court.

3. For such other and further relief as this Court may deem proper and necessary in these premises.

Phil L. Hansen
Attorney General of Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah

State of Utah }
County of Salt Lake } ss

Calvin L. Rampton, first being duly sworn upon his oath, deposes and says that he is the duly elected, qualified, and acting Governor of the State of Utah; that he has read the contents of the foregoing complaint; that the same are true of his own knowledge, except as to

those matters alleged therein on information and belief; that as to those, he believes the same to be true.

.....

Calvin L. Rampton
Governor of Utah

Subscribed and sworn to before me this 27th day of February, 1967.

.....

Clyde L. Miller
Secretary of State of Utah

CERTIFICATE OF SERVICE

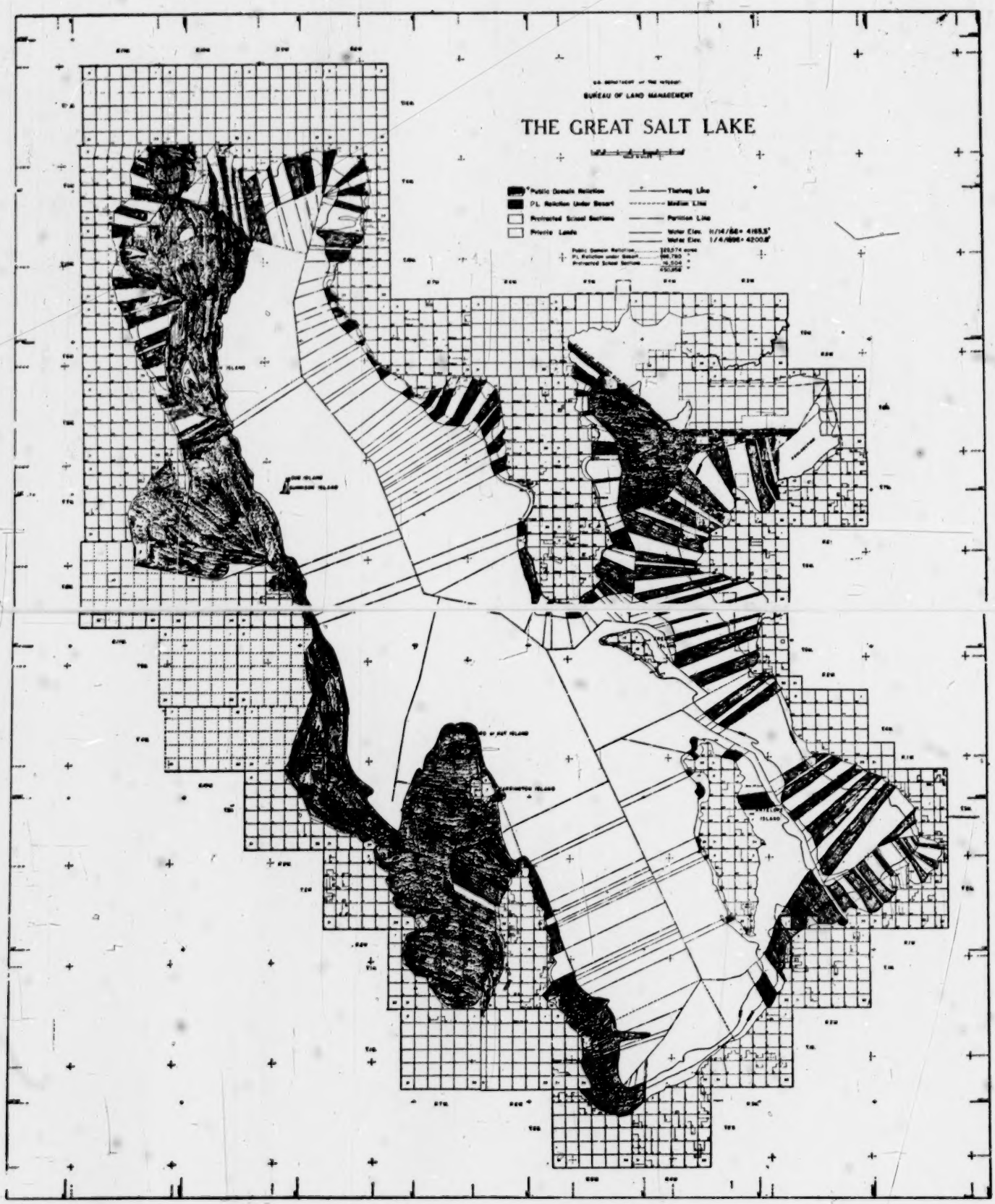
I, Phil L. Hansen, Attorney General of the State of Utah, counsel for plaintiff, and a member of the bar of this Court, hereby certify, in accordance with Rule 33(b) of the rules of this Court, that five copies of the foregoing motion for leave to file complaint and complaint were personally served upon the Solicitor General of the United States of America, Department of Justice, Washington 25, D.C., counsel for defendant United States of America, by having same delivered to his office, strictly in accordance with the requirements of Rule 33 (1) and (2) of the rules of this court, this 1st day of March, 1967.

.....

Phil L. Hansen
Attorney General of Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah


BUREAU OF LAND MANAGEMENT
THE GREAT SALT LAKE
Public Domain Reliction
P.L. Reliction Under Resort
Protracted School Sections
Private Lands
Thalweg Line
Median Line
Partition Line
Water Elev. 11/14/86= 4193.5'
Water Elev. 1/4/1986= 4200.8'

APPENDIX

Act of June 3, 1966 (Public Law 89-441, 80 Stat. 192) as amended by the Act of August 23, 1966 (Public Law 89-542)

AN ACT TO authorize conveyance of certain lands to the State of Utah based upon fair market value

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

Sec. 1. The Secretary of the Interior shall within six months of the date of the passage of this Act complete the public land survey around the Great Salt Lake in the State of Utah by closing the meander line of that Lake, following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed areas.

Sec. 2. Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with Section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: Provided, however, that the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, or (2) any lands within the Bear River Migratory Bird Refuge and the Weber Basin Federal reclamation project. Such conveyance shall be made when the survey required by section 1 has been completed and the agreement required by section 6 has been made.

Sec. 3. The conveyance authorized by this Act shall

contain an express reservation to the United States of all minerals, except brines and minerals in solution in the brines, or precipitated or extracted therefrom in whatever Federal lands there may be below the meander line of Great Salt Lake, together with the right to prospect for, mine, and remove the same. The minerals thus reserved shall thereupon be withdrawn from appropriation under the public land laws of the United States, including the mining laws, but said minerals, in the discretion of the Secretary of the Interior, may be disposed of under any of the provisions of the mineral leasing laws that he deems appropriate: Provided, That any such lease shall not be inconsistent. as determined by the Secretary of the Interior, with the other uses of said lands by the State of Utah, its grantees, lessees, or permittees.

Sec. 4. As a condition of the conveyance authorized in this Act, and in consideration thereof, the State of Utah shall, (a) upon the express authority of an Act of its legislature, convey to the United States by quitclaim deed all of its rights, title, and interest in lands upland from the meander line, which lands the State may claim against the United States by reason of said lands having been, or hereafter becoming, submerged by the waters of Great Salt Lake, and (b) pay to the Secretary of the Interior the fair market value, as determined by the Secretary, of the lands (including any minerals) conveyed to it pursuant to section 2 of this Act. The Secretary of the Interior, after consultation with the State of Utah, may accept in payment in behalf of the United States, in lieu of money only, interests in lands, interests in mineral rights, including those beneath the lakebed, the relinquishment of land selection rights, or any combination thereof equal to the fair market value.

Sec. 5. Within nine months after the date of enactment of this Act the State of Utah shall elect one of the alternatives set out in subsection (a) or subsection (b) of this section, and a failure so to elect shall render null and void any conveyance pursuant to this Act. The State —

(a) may request the Secretary of the Interior to determine the fair market value of the lands as of the date of the completed survey:

(1) In reaching a determination of the fair market value as of that time, the Secretary shall make a comprehensive study of the lands and minerals which are the subject of this Act;

(2) Nothing in this section shall be deemed to limit or prevent the Secretary from giving consideration to all factors he deems pertinent to an equitable resolution of the question of the proper consideration to be paid by the State of Utah to the United States for such lands;

(3) The Secretary shall transmit his value determination to the Governor of the State of Utah not later than two years after he receives the request referred to above in this subsection. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void; or

(b) may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act as may be found by the court to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determi-

nation, the conveyance authorized by section 2 of this Act shall be null and void.

Sec. 6 Pending resolution of the amount and manner of compensation to be paid by the State of Utah to the United States as provided herein, the State of Utah is authorized after making the agreement required by this section to issue permits, licenses, and leases covering such of these lands as the State deems necessary or appropriate to further the development of the water and mineral resources of the Great Salt Lake, or for other purposes. The State of Utah, by or pursuant to an express act of its legislature, shall agree to assume the obligation to administer the lands, for the purposes set forth above, in the manner of a trustee and any proceeds derived by the State of Utah therefrom shall be paid to the United States, until compensation for the full value of said lands as herein provided is made. Such proceeds paid to the United States shall be to the credit of the State of Utah as part of the compensation for which provision is made herein. If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title, or interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest.

In the event the conveyance authorized by section 2 of this Act becomes null and void, then any valid permits, licenses, and leases issued by the State under authority of this section, shall be deemed permits, licenses, and leases of the United States and shall be administered by the Secretary in accordance with the terms and provisions thereof, excepting for land rental rates which rates shall be subject to change based upon fair rental value as determined by the Secretary of the Interior and shall be subject to review and appropriate modification not less frequently than every five years by the Secretary of the Interior in accordance with rules and regulations of the Department of the Interior.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

RESPONSE TO MOTION FOR LEAVE TO FILE COMPLAINT

Section 5 of the Act of June 3, 1966, 80 Stat. 192, provides that, within nine months of the date of its enactment, the State of Utah may maintain an action in this Court to secure a judicial determination of the right, title and interest of the United States in the lands lying below the meander line of the Great Salt Lake. Section 5(b) gives the consent of the United States to be thus sued.

The complaint that the State of Utah proposes to file herein conforms to the requirements of the Act. Accordingly, the United States does not oppose the motion for leave to file the complaint. Indeed, we urge the Court to grant the motion. This original suit would appear to afford the only means of resolving a substantial controversy between the State and the United States over extensive and valuable lands

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and mineral deposits. In addition, important questions of law relating to the doctrine of reliction are presented, while the underlying facts are largely undisputed. The case, in short, would appear to present a suitable occasion for invocation of the original jurisdiction of this Court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U. S. GOVERNMENT PRINTING OFFICE: 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ANSWER

I

The defendant admits the allegations of Paragraph I of the Complaint.

II

The defendant denies the allegation of the first sentence of Paragraph II of the Complaint that the State of Utah owns the lands which are the subject of this suit. The defendant admits the remaining allegations in Paragraph II.

III

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the first two sentences of Paragraph III of the Complaint that the Great Salt Lake is a navigable body of water. The remaining allegations of Para-

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graph III are conclusions of law, premised for the most part upon the supposed navigability of the Great Salt Lake; such legal conclusions require no response in this Answer, and therefore are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied.

IV

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first three sentences of Paragraph IV of the Complaint. The defendant denies the allegations of the fourth and fifth sentences of Paragraph IV of the Complaint. The defendant admits the truth of the allegation of the sixth sentence of Paragraph IV. The defendant denies the allegations of the seventh and eighth sentences of Paragraph IV. The defendant admits the allegations of all of the remaining sentences of Paragraph IV, except for the thirteenth, as to which defendant denies plaintiff's claim of ownership, and the last (the fourteenth), which the defendant denies in its entirety.

V

The allegation of the first sentence of Paragraph V of the Complaint is a conclusion of law, which requires no answer, and which, therefore, is neither admitted nor denied; but to the extent that it may be construed as an allegation of fact, it is denied. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation

of the second sentence of Paragraph V of the Complaint. The remaining allegations of Paragraph V are merely argumentative, and do not require an answer, but to the extent that they may be construed as allegations of fact, they are denied.

VI

The defendant denies each and every allegation of the Complaint not specifically admitted, denied, or qualified herein.

WHEREFORE, having fully answered, the defendant prays this Court to confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

MOTION OF MORTON INTERNATIONAL, INC. TO INTERVENE AS DEFENDANT, AND ANSWER

L. M. MCBRIDE
FRANK A. WOLLAEGER
110 North Wacker Drive
Chicago, Illinois 60606

MYER FELDMAN
MARTIN JACOBS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

MCBRIDE, BAKER, WIENKE & SCHLOSSER
GINSBURG AND FELDMAN
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 60604

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No. 31, ORIGINAL

IN THE

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OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

MOTION OF MORTON INTERNATIONAL, INC. TO INTERVENE AS DEFENDANT, AND ANSWER

MORTON INTERNATIONAL, INC., a Delaware corporation (hereinafter referred to as "Morton"), by its attorneys, respectfully moves the Court for an order granting it leave to intervene as a defendant in this action in order to assert the defenses set forth in its proposed answer, *infra*, p. 11. The grounds of this motion are set forth below.

I. MORTON HAS AN INTEREST IN THE CONTROVERSY

In this action the State of Utah seeks a judicial determination of its title to certain lands situated below the surveyed meander line of the Great Salt Lake and an adjudication that the United States has no right, title or interest in or to those lands or the minerals therein. The action was instituted pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and the Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349. On May 15, 1967 the Court granted Utah leave to file its complaint and allowed the United States sixty days thereafter to file its answer. On July 14, 1967 the United States filed its answer.

Utah alleged in its complaint that on January 4, 1896, the date on which the State was admitted to the Union, the

Great Salt Lake was a navigable body of water and that therefore it is the owner of the absolute right to the bed of the Lake as delineated and determined by the official surveyed meander line. Utah has also alleged that it owns all of the minerals contained in the waters and bed of the Lake, and that it believes the United States claims to own approximately 436,000 acres of the bed of the Lake. The latter lands are generally identified on a map prepared by the Bureau of Land Management of the Department of Interior, a copy of which was appended to the complaint as Exhibit A.

In its answer, the United States denied Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that the United States is the owner of all right, title, and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is "to have these lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended." (Answer, p. 3)

As shown on Exhibit A to the complaint, a part of the land claimed by the United States consists of exposed lands (hereinafter referred to as "relicted lands") situated between the present water's edge of the Lake and the surveyed meander line in those areas where the United States owns the land (hereinafter referred to as "uplands") situated above and adjacent to the meander line, and a part consists of relicted lands situated around the Lake where the uplands are owned by private persons. These latter relicted lands are referred to as "PL Reliction under Basart"[1] on Exhibit A.

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[1] "Basart" presumably refers to the theory of the administrative decision in *Madison* v. *Basart*, 59 I.D. 415 (1947). See fn. 3, *infra*, p. 5.

Morton claims title to a portion of the lands which, in this action, are being claimed both by Utah and the United States. To the extent that the latter claims can presently be ascertained, these lands are shown in red on the plat of survey, a copy of which is appended to the answer attached hereto as Exhibit II, *infra*, p. 24. Morton's claim of title is based on the following:

(a) Morton is the owner of tracts of uplands, deriving title from the United States, by virtue of mesne conveyances, through patents granted by the United States under authority of Acts of Congress and through the Enabling Act approved July 16, 1894, 28 Stat. 107. Those tracts are described, and those patents and Acts of Congress set forth, in Exhibit I to the answer, *infra*, p. 17. Those tracts are now, and have been at all times, riparian to the Lake.

(b) Pursuant to federal decisional law, the grants contained in the Government patents conveyed to Morton title to the tracts of relicted lands in front of Morton's uplands, which relicted lands are shown in Exhibit II.

It is Morton's further claim that its title with respect to each tract extends to the thread of the Lake. (The survey projections delineating Morton's ownership to the various threads of the Lake are shown on the plat of survey, Exhibit III of the answer, *infra*, p. 25; the lands from the water's edge to the various threads of the Lake are hereinafter referred to as "water covered lands.") The basis of this claim is that, on the date of Utah's admission to statehood, the Lake was not navigable, and therefore these water covered lands are part of Morton's property under federal decisional law.

The Statute authorizing the filing by Utah of its complaint in this action (Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349) estab-

lished a method for determining title to the disputed lands. Section 2 of the Act in pertinent part provides:

> "Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with Section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: Provided, ..."

and Section 4, in turn, provides in pertinent part:

> "As a condition of the conveyance authorized in this Act, and in consideration thereof, the State of Utah shall, (a) upon the express authority of an Act of its legislature, convey to the United States by quitclaim deed all of its rights, title and interest in lands upland from the meander line, which lands the State may claim against the United States by reason of said lands having been, or hereafter becoming, submerged by the waters of Great Salt Lake, and (b) . . . ."

The Act then establishes a procedure for the judicial determination of the title conveyed under the quitclaim deed of the United States. Section 5 in pertinent part provides that Utah:

> ". . . (b) may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to Section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given."

As set forth above, a substantial portion of the lands conveyed to Utah by the United States' quitclaim deed,

pursuant to the Act, is claimed by Morton.[2] In these circumstances, Morton plainly has an interest in the controversy.

II. A DECREE CANNOT BE MADE WITHOUT AFFECTING MORTON'S INTEREST; MORTON IS THEREFORE AN INDISPENSABLE PARTY

Clearly, no decree may be entered in this proceeding unless Morton is joined as a party. As shown above, a substantial portion of the lands, title to which is in dispute in this litigation, is claimed by Utah (on the theory that it owns the bed of the Lake of which these lands allegedly are a part), by the United States (under the common law doctrine of reliction and the Basart doctrine[3]), and by Morton (under the common law doctrine of reliction and by reason of its claim of non-navigability of the Lake). It is obvious, therefore, that the present parties are seeking an adjudication of Morton's interest as well as their own in this suit.

In a long line of decisions the Court has held that an absent person must be joined as a party to a pending equitable action if a decree cannot be entered without affecting his interest; if that party is not joined, the suit must be dismissed. One of the earliest such cases, *Mallow*

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[2] We assume that Utah and the United States exchanged quitclaim deeds in accordance with Sections 2 and 4 of the Act prior to the commencement of this action. But even if they did not do so, the suit nevertheless is one to have title to the disputed lands determined.

[3] The doctrine derives its name from the administrative decision in *Madison* v. *Basart*, 59 I.D. 415 (1947), in which the Department of Interior ruled that, where a substantial accretion had formed between the meander line and the shore line of the Missouri River by the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827), involved a dispute over title to land. In that action neither the trustee holding legal title to the land nor the trust beneficiaries having equitable interests, from whom complainants alleged they derived title, were joined as defendants. In affirming a dismissal of the bill of complaint for failure to join these persons as parties the Court stated (25 U.S. at 198):

> "In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties.
>
> "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. *We put it on the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court.*" (Emphasis added)

The decision in *Mallow* v. *Hinde* was followed and expanded upon in the landmark case, *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), involving an action to rescind a compromise and settlement agreement in which the plaintiff failed to join certain parties to the agreement. The Court reversed a decree for the plaintiff for failure to join these "indispensable parties" laying down the following guidelines (58 U.S. at 139):

> "The court [citing *Mallow* v. *Hinde, supra*] here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are

> commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. *Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.*" (Emphasis added)

Further, in considering the effect of the Act of Congress of February 28, 1839, 5 Stat. 321, relating to jurisdiction between parties, and the 47th Rule for the Equity Practice of the Circuit Courts of the United States made pursuant to that Act, the Court stated (58 U.S. at 141):

> "It remains ~~true~~, notwithstanding the Act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights."[4]

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[4] The question of whether present Rule 19 of the Federal Rules of Civil Procedure has affected the indispensable party doctrine is presently before the Court in *Provident Trademens Bank & Trust Co.* v. *Lumbermens Mutual Casualty Co.*, 365 F.2d 802 (3rd Cir. 1966), cert. granted 386 U.S. 940 (1967). The court of appeals there held that the indispensable party doctrine is not procedural but declares substantive law and accords a substantive right to a person to be joined as a party when his interest may be affected by an action, and that therefore the doctrine was not affected by Rule 19, either before or after its revision in 1966. It is Morton's position that, regardless of the ultimate decision in that case, it is an indispensable party within the meaning of Rule 19 for the reasons stated in this motion.

The rule of *Shields* v. *Barrow* that the failure to join an indispensable party is fatal error and the criteria there established for determining whether an absent party is indispensable have been followed in many decisions of this Court. *E.g., Barney* v. *Baltimore City,* 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead,* 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean,* 97 U.S. 423 (1878); *State of California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895); *State of Minnesota* v. *Northern Securities Co.,* 184 U.S. 199 (1902); *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 (1961).

It is clear that Morton's interest in these lands would, within the meaning of the indispensable party doctrine, be "affected by the decree," even though a decree entered in its absence would not technically be binding on Morton. In *State of California* v. *Southern Pacific Co.,* 157 U.S. 229 (1895), the State brought an original action to settle a title dispute over certain tidelands of the Bay of San Francisco along the Oakland water front. The Court held that the failure to join the City of Oakland and the Oakland Water-Front Company, each claiming to have an interest in the lands, prevented the Court from proceeding to a decree as between the parties, stating (157 U.S. at 257):

> "We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, *even though they might not be technically bound in subsequent litigation in some other tribunal.*" (Emphasis added)

Similarly, in the widely-quoted case of *State of Washington* v. *United States,* 87 F.2d 421 (1936), the Ninth

Circuit held a party to be indispensable even though it would not technically have been bound by a decree entered in its absence. There, a lessee was sued for the right to possession of lands and the lessor was not joined. The Court held that the suit would have to be dismissed for want of an indispensable party unless the lessor were joined because a decree entered in its absence would place a cloud on its title.

Applying the equitable principles developed and adhered to by this Court it is clear that Morton is an indispensable party to this action. The basis of Morton's claims (and consequently its rights and interests) with respect to the subject lands is not severable and distinct from that of Utah and the United States, but, in fact, is inextricably bound up in the claims of the two parties. The United States claims title to these lands as against Morton under the Basart doctrine. That claim presupposes the existence of certain facts at the time the patents to such lands were granted which would have, in the Government's view, prevented a conveyance of such lands to be included within the patent grants. Utah claims title to these same lands as of the date of its statehood as successor to the United States' interest in its sovereign capacity. Accordingly, an adjudication of title in favor of either Utah or the United States with respect to the lands claimed by Morton would necessarily affect adversely Morton's interest. In such case, a cloud would be placed on Morton's title with respect to which it would in all probability have no legal remedy.[5] Such a result would be "wholly inconsistent with equity and good conscience." *Shields* v. *Barrow, supra.*

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[5] In disregard of Morton's right of ownership, the State of Utah has seized and taken, without instituting judicial proceedings, Morton's lands lying below the meander line of the Lake (*i.e.*, the relicted and water covered lands). To protect its rights, Morton has

(continued on next page)

For the foregoing reasons the motion of Morton International, Inc. for leave to intervene as a party defendant in this action should be granted.

Respectfully submitted,

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsburg and Feldman
Of Counsel

(continued from preceding page)
filed suit against the State and various of its officials and others in the United States District Court for the District of Utah (Civil No. C-127-66) alleging that Utah has taken and deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution. Utah filed an answer and counterclaim alleging, among other things, that "the United States owns or claims to own certain interests in the lands and other properties which plaintiff seeks to obtain by its amended complaint, and is therefore an indispensible party [sic] party to this action," and that, since the United States has not been made a party to that action, the complaint should be dismissed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31 ORIGINAL

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

ANSWER OF DEFENDANT MORTON INTERNATIONAL, INC.

FIRST DEFENSE

I.

Defendant MORTON INTERNATIONAL, INC. admits the allegations of paragraph I of the Complaint.

II.

This defendant denies the allegation of the first sentence of paragraph II of the Complaint to the effect that plaintiff owns the lands which are the subject of this action. This defendant admits the remaining allegations of paragraph II of the Complaint.

III.

This defendant denies all the allegations in paragraph III of the Complaint to the extent that they may be construed as allegations of fact.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the first two sen-

tences of paragraph IV of the Complaint. This defendant admits the allegations of the third sentence of paragraph IV of the Complaint. This defendant denies the allegations of the fourth and fifth sentences of paragraph IV of the Complaint. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the sixth and seventh sentences of paragraph IV of the complaint. This defendant denies the allegations contained in the eighth sentence of paragraph IV of the Complaint. This defendant admits the allegations contained in the ninth, tenth, eleventh and twelfth sentences of paragraph IV of the Complaint. This defendant admits that the claim of ownership of the subject lands by the United States of America is adverse to plaintiff State of Utah's claim of ownership, but this defendant denies plaintiff's claim of ownership contained in the thirteenth sentence of paragraph IV of the Complaint. This defendant denies the allegations contained in the fourteenth sentence of paragraph IV of the Complaint, except this defendant admits that the United States has no right, title or interest in or to any of the lands illustrated in Exhibit A of the Complaint or any other part of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended, as to which this defendant claims ownership as hereinafter set forth in the Second Defense of this Answer.

V.

This defendant denies all the allegations contained in paragraph V of the Complaint to the extent that they may be construed as allegations of fact, except that this defendant admits that plaintiff has issued a number of mineral leases to lessees with respect to the subject lands who are able and anxious to establish a mineral industry around the Great Salt Lake, that the minerals and brines included within the

waters of the Great Salt Lake have a substantial value if the same can be extracted, processed and marketed, that any mineral development thereof requires the use of the exposed lands for purposes of mineral extraction, that the mineral extraction industry cannot proceed until there is certainty of title as to the subject lands, that the claims and actions of the United States have impaired the plaintiff and its lessees from proceeding with the mineral extraction industry, and that the claims and actions of the United States have cast a cloud on the alleged ownership of the plaintiff to the subject lands.

VI.

This defendant denies each and every allegation of the Complaint not specifically admitted, denied or qualified.

SECOND DEFENSE

This defendant realleges as part of this defense each of the admissions, denials and qualifications of paragraphs I through VI of its First Defense and further answering states:

I.

This defendant is the owner of tracts of lands (hereinafter referred to as "uplands") and derives title thereto from the United States by virtue of mesne conveyances through government patents under authority of Acts of Congress and through the Enabling Act, approved July 16, 1894, 28 Stat. 107, which uplands are described and which patents and Acts of Congress are set forth in Exhibit I attached hereto and made a part of this Answer, and are shown in black on the plat of survey attached hereto and made a part of this Answer as Exhibit II. These uplands are now and have been at all times pertinent hereto riparian to the Great Salt Lake.

II.

The grants contained in said government patents, through mesne conveyances, conveyed to this defendant title in fee simple to the tracts of lands shown in crosshatching in Exhibit II, which tracts are hereinafter referred to as "relicted lands". These relicted lands are in front of this defendant's uplands and have been exposed by the recession of the waters of the great Salt Lake. They have been annexed to and have become part of this defendant's uplands by virtue of the grants contained in said government patents and the Acts of Congress under which said patents were issued, so that the boundary between said uplands, as annexed to said relicted lands, and the water covered lands underlying the waters of the Lake is the water's edge of the Lake wherever it might be from time to time.

III.

This defendant's ownership with respect to each tract of land described in Exhibits I and II extends to the thread of the Great Salt Lake, and the survey projections delineating this defendant's ownership to the various threads of the Lake are shown in the plat of survey attached hereto and hereby made a part of this Answer as Exhibit III. These lands from the water's edge to the various threads of the Lake are hereinafter referred to as "water covered lands". On January 4, 1896, the date on which the State of Utah was admitted to statehood, those portions of the Lake set forth in Exhibit III as this defendant's water covered lands were not navigable, nor was the balance of the Lake navigable on such date. These water covered lands have been annexed to and have become a part of this defendant's uplands, as annexed to said relicted lands, by virtue of the grants contained in said government patents and the Acts of Congress under which said patents were issued.

IV.

A substantial portion of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended, which have been conveyed by the United States to the plaintiff in accordance with the provisions of the Act and which are the subject matter of this action, are lands owned by this defendant as set forth in paragraphs I, II and III of the Second Defense and, to the extent presently ascertainable, are shown in red on Exhibit II. Neither the plaintiff nor the United States has any right, title or interest in or to any of defendant's relicted lands or water covered lands which constitute a part of the lands described in Section 2 of the Act of June 3, 1966, as amended.

WHEREFORE, this defendant prays that a decree be entered by this Court:

(a) Confirming, declaring and establishing that this defendant is the owner of all right, title and interest in all of said relicted and water covered lands described in paragraphs I, II and III of the Second Defense which constitute a part of the lands described in Section 2 of the Act of June 3, 1966, as amended, and the minerals located therein;

(b) Confirming, declaring and establishing that the State of Utah and the United States are without any right, title or interest in said relicted and water covered lands and the minerals located therein;

(c) Declaring that any conveyance, pursuant to Section 2 of the Act of June 3, 1966, as amended, made by the United States to the State of Utah with respect to said relicted and water covered lands be null and void;

(d) Granting this defendant such other and further relief as this Court may deem proper and necessary in the premises.

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
17 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsberg and Feldman
Of Counsel

September, 1967.

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that five (5) copies each of the foregoing Motion and Answer were personally served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530, and the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah, by having the same delivered to their respective offices, pursuant to paragraphs 1 and 2 of Rule 33 of the Rules of this Court.

Frank A. Wollaeger
Counsel for Morton International, Inc.

EXHIBIT I

BOX ELDER COUNTY

All of Sec. 1 in T 11 N, R 9 W, SLB&M.

United States Patent No. 60 (Railroad Grant) dated October 25, 1895 pursuant to Act of Congress approved July 1, 1862 as amended by the Act of July 2, 1864 and the Act of July 3, 1866.

Lots 5 and 6 of Sec. 2 in T 11 N, R 9 W, SLB&M and Lots 7 and 8 of Sec. 2.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

All of Sec. 5 in T 11 N, R 8 W, SLB & M.

United States Patent No. 52 (Railroad Grant) dated August 7, 1894 pursuant to Act of Congress approved July 1, 1862 as amended by the Act of July 2, 1864 and the Act of July 3, 1866.

Lots 3, 4, 5, 6, 7, 8 and 9 of Sec. 6, T 11 N, R 8 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lot 10 of Sec. 6, T 11 N, R 8 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

All of Sec. 9, T 11 N, R 8 W, SLB&M.

United States Patent No. 52 (Railroad Grant) dated August 7, 1894 pursuant to Act of Congress approved July 1, 1862 as amended by the Act of July 2, 1864 and the Act of July 3, 1866.

WEBER COUNTY

Lots 1, 2 and 3 of Sec. 28, T 6 N, R 3 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

EXHIBIT I (continued)

WEBER COUNTY (continued)

Lots 1 and 2, Sec. 29, T 6 N, R 3 W, SLB&M.

United States Patent No. 83 (Railroad Grant) dated January 11, 1899, pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

Lot 1, Sec. 34, T 6 N, R 3 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 1, 2, 3 and 4, Sec. 12, T 6 N, R 4 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

DAVIS COUNTY

That portion of the SW ¼ of Sec. 5, T 3 N, R 1 W, SLB&M, lying NE of the Shore of Great Salt Lake and NW and SW of the lines described as follows: Beginning at a point N 40° W 1.2 chains from a point, on the S line of said Section, 14 chains W of the SE corner of the SW ¼ of said Section, running thence N 35° 50′ E 0.76 chains, N 40° W 23.53 chains, N 38° W to the W line of said Section commencing again at said point of beginning and running thence S 35° 50′ W to the S line of said Section.

United States Patent No. 38 (Railroad Grant) dated June 17, 1901 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864

A tract of land bounded by line beginning 22.75 chains S of NW corner of Sec. 6, T 3 N, R 1 W, SLB&M, S 84°, E 69.2 Rods, S 74°, E 68 rods, S 59°, E 80 rods, S 76°, E 30 chains, S to Great Salt Lake, NW along shore of said lake to W line of Section N to beginning.

Homestead certificate #4428 dated March 1, 1892 pursuant to Act of Congress approved May 20, 1862. United States Certificate #4199 dated November 17, 1894 pursuant to Act of Congress of April 24, 1820

EXHIBIT I (continued)

DAVIS COUNTY (continued)

Lot 1 of Sec. 8, T 3 N, R 1 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Tract bounded by a line commencing at a point which is N 88° 25′ W 13.25 chains, S 24° E 10.80 chains and S 71° 45′ W 14 chains from the NE corner of the NW ¼ of the SE ¼ of Sec. 9, T 3 N, R 1 W, SLB&M, running thence S 45° 45′ E 2.45 chains, S 42° 45′ E 15 chains S 37° E 16.25 chains W to shore of Great Salt Lake, NW along the shore of said lake to its intersection with a line running S 71° 45′ W from point of beginning and thence N 71° 45′ E to said point of beginning.

United States Patent No. 18 (Railroad Grant) dated February 24, 1877, pursuant to Act of Congress approved July 1, 1862 as amended by Act of Congress of July 2, 1864.

Tract bounded by a line beginning 29.03 chains W of the NE corner of Sec. 22, T 3 N, R 1 W, SLB&M, running thence S 25.47 chains, NW 12.50 chains to the SW corner of the NW ¼ of the NE ¼ of said section, W to Great Salt Lake, NE along the shore of said lake to its intersection with the N line of said section and thence E to said point of beginning.

Homestead certificate No. 1577, dated November 20, 1882 pursuant to Act of Congress approved May 20, 1862.

Homestead certificate No. 511 dated September 30, 1882 pursuant to Act of Congress approved May 20, 1862.

United States certificate No. 222 dated September 30, 1871 pursuant to Act of Congress of April 24, 1820.

Lot 1, Sec. 34, T 3 N, R 1 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

EXHIBIT I (continued)

DAVIS COUNTY (continued)

All of Lots 1, 2 and 3, Sec. 35, T 3 N, R 1 W, SLB&M.

United States Patent No. 39 (Railroad Grant) dated June 17, 1901, pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

All of Lot 1, Sec. 1, T 3 N, R 2 W, SLB&M.

United States Patent No. 44 (Railroad Grant) dated January 7, 1902 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

Tract bounded by a line commencing at a point 1307.1 ft. W from the NE corner of Lot 1, Sec. 18, T 4 N, R 2 W, SLB&M, running thence South 5° 8′ E 480 ft., S 35° 33′ E 670.2 ft., S 3° 23′ W 911.3 ft., S 45° 26′ E 492.2 ft., S 34° 22′ E 324.2 ft., S 4° E 562 ft., S 54° 40′ E 370 ft., S 423.3 ft., W 450 ft., S 225 ft., S 76° E 515.4 ft., S 38° 5′ E 971.52 ft., S 260.7 ft., S 61° 30′ W 396 ft., S 80° W 241.56 ft., N 46.2 ft. to the S line of said Section, W to Great Salt Lake, N along shore of lake to N line of said Section and thence E to said point of beginning.

Homestead certificate No. 3230 dated October 18 1886 pursuant to Act of Congress approved May 20, 1862

United States Certificate No. 331 dated November 9, 1891 pursuant to Act of Congress of April 24, 1820

Lots 1, 2 and 3 of Sec. 19, T 4 N, R 2 W, SLB&M.

United States Patent No. 29 (Railroad Grant) dated February 24, 1897 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

Tract bounded by a line beginning at the SE corner of the NE ¼ of Sec. 19, T 4 N, R 2 W, SLB&M, running thence W 20 chains, N 20 chains, W 20 chains, N 643.5 ft., E 1650 ft., S 1303.5 ft., E 990 ft., S 1303.5 ft., E 990 ft., and thence S 660 ft. to said point of beginning.

United States Patent No. 29 (Railroad Grant) dated February 24, 1897 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

EXHIBIT I (continued)

DAVIS COUNTY (continued)

The SW ¼ and the S ½ of the SE ¼ of Sec. 27, T 4 N, R 2 W, SLB&M.

United States Patent No. 44 (Railroad Grant) dated January 7, 1902 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

Lots 1, 2 3 and 4, Sec. 28 T 4 N, R 2 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

All of Sec. 29, T 4 N, R 2 W, SLB&M, lying N and E of Great Salt Lake.

United States Patent No. 29, (Railroad Grant) dated February 24, 1897 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

Lots 1 and 2 of Sec. 34, T 4 N, R 2 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 1 and 2, and the N ½ of the NW¼ of Sec. 35, T 4 N, R 2 W, SLB&M.

United States Patent No. 44 (Railroad Grant) dated January 7, 1902 pursuant to Act of Congress approved July 1, 1862 and July 2, 1864.

SALT LAKE COUNTY

Lots 1, 2, 3 and 4, of Sec. 6, T 1 N, R 2 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 1, 2, 3 and 4 of Sec. 13, T 1 N, R 3 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 1, 2, 3 and 4, and NE ¼ of SE ¼ of NE ¼ of Sec. 24, T 1 N, R 3 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

EXHIBIT I (continued)

SALT LAKE COUNTY (continued)

Lots 1, 2, 3 and 4 of Sec. 25 and Lot 1 in Sec. 26, T 1 N, R 3 W, SLB&M.

United States certificate No. 719 dated November 9, 1891 pursuant to Act of Congress of April 24, 1820

Lot 1, Sec. 31, T 2 N, R 2 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Commencing at SE corner Sec. 3, T 1 S, R 3 W, SLB&M, N 213 rods, W 685.75 ft., N 29° 30′ E 528 ft. to S line Lot 1, W to Lake Shore line, SW along said line to N line of tract deeded to Western Phosphates, Inc. thence along said line S 49° E 350 ft., thence along 10° curve to right 230 ft., S 24° 40′ E 115 ft., S 56° 45′ E 80 ft., S 30° 45′ E 395 ft., S 49° 33′ E 950 ft., thence along 6° curve to left 751.39 ft., N 85° 21′ E 979.501 ft. N 310 ft. to beginning. Less Utah Copper Ground and State Road.

United States certificate No. 440 dated January 10, 1889 pursuant to Act of Congress of April 24, 1820

TOOELE COUNTY

Lot 1, Sec. 6, T 2 S, R 4 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 1, 2, 3 and 4 and the SE ¼ of NE¼ of Sec. 7, T 2 S, R 4 W, SLB&M.

United States certificate No. 686 dated November 20, 1890 pursuant to Act of Congress of April 24, 1820

Lots 1, 2, 3, 4 and 5, Sec. 4, T 2 S, R 5 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lot 1, Sec. 9, T 2 S, R 5 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

EXHIBIT I (continued)

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Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

Lots 2, 3 and 4, Sec. 11, T 2 S, R 5 W, SLB&M.

Act of Congress approved July 16, 1894 (28 Stat. 107) (Enabling Act)

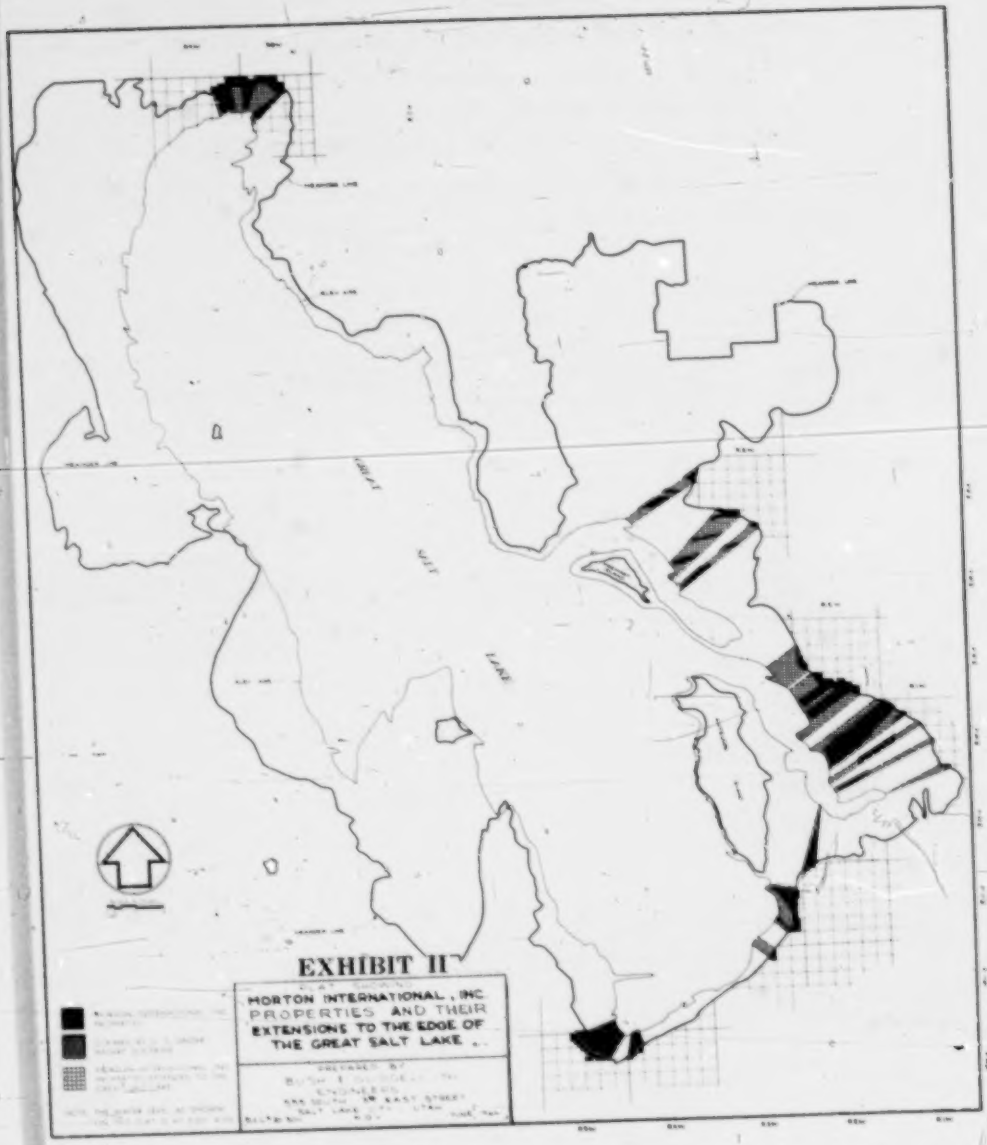
EXHIBIT II
MORTON INTERNATIONAL, INC
PROPERTIES AND THEIR
EXTENSIONS TO THE EDGE OF
THE GREAT SALT LAKE.

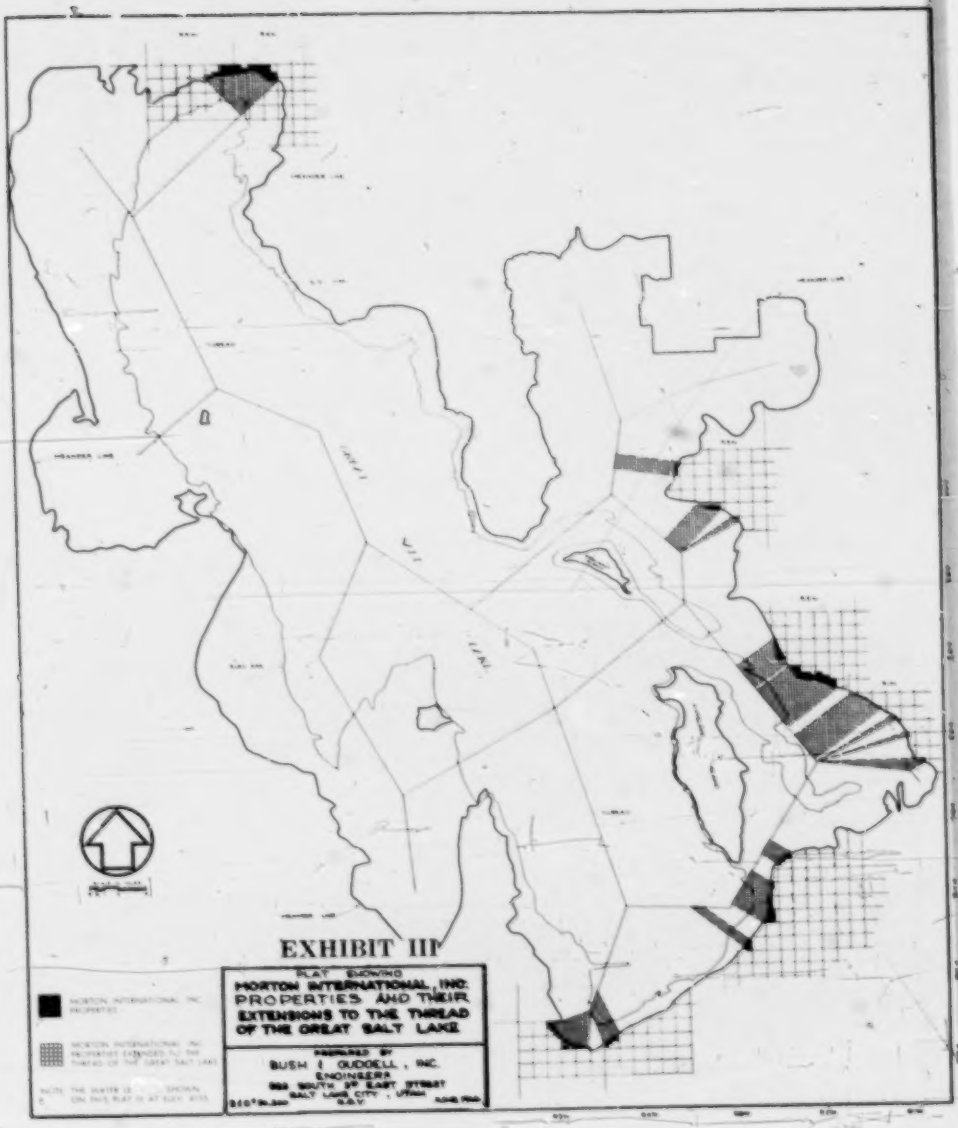
EXHIBIT III
PLAT SHOWING
MORTON INTERNATIONAL, INC.
PROPERTIES AND THEIR
EXTENSIONS TO THE THREAD
OF THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDDELL, INC.
ENGINEERS
SALT LAKE CITY, UTAH

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SUPREME COURT, U. S.

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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant

BRIEF OF THE STATE OF UTAH IN OPPOSITION TO MOTION BY MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE AND ANSWER

Phil L. Hansen
Attorney General of Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah

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IN THE

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October Term, 1967

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STATE OF UTAH,

Plaintiff,

v.

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Defendant

BRIEF OF THE STATE OF UTAH IN OPPOSITION TO MOTION BY MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE AND ANSWER

This brief is submitted by the State of Utah in opposition to the motion by Morton International, Inc., (hereinafter referred to as "Morton") to intervene as a defendant and answer the complaint of the State of Utah. It is submitted that the motion by Morton is not well founded and should be denied for the reasons set forth in this brief.

SUMMARY OF ARGUMENT

While Morton's motion to intervene is expressly bottomed on its view that it is an indispensable party to any adjudication in this action, it must be assumed that the effort to intervene essentially is brought under Rule 24(a)(2), revised July 1, 1966. That subdivision of Rule 24 relates to intervention as a matter of right in circumstances such as those claimed by Morton. Thus, Rule 24, rather than Rule 19, is the vehicle for intervention.

Any question with respect to the absence of an indispensable party in violation of Rule 19 is to be raised by the defendant or by the court *sua sponte*—not by an indispensable party. If raised by the defendant, the procedure is pursuant to Rule 12. There the absence of an indispensable party may be set up by way of defense in the answer, or may be asserted by motion under subsection (b)(7). Rule 12(h) also provides that such defense is not waived by a failure to raise the same in the answer or by motion, but may be raised subsequently, even at the time of trial on the merits.

Intervention, on the other hand, which must be pursuant to Rule 24(a)(2), requires that the person seeking to intervene must file his motion timely, must show that he has or claims rights which will be impaired or impeded by the disposition of the action without his presence, and must show that he is not adequately represented. Some significant differences apparently existed prior to July 1, 1966, between the criteria used to determine intervention as a matter of right under

Rule 24 and the defense of failure to join as a party a person who would be indispensable under Rule 19. But the 1966 revision of the rules specifically revised Rules 12, 19 and 24 so far as they pertain to the issues at hand. While there still are important differences in many respects, it appears that no crucial distinction now exists between the criteria for determining indispensability and intervention as a matter of right, at least to the extent that such criteria must be applied in this proceeding. This is so because the State of Utah admits that Morton has filed its motion timely, and further admits that Morton's claimed interest is not being represented directly by either Utah or the United States. The only issue disputed by Utah is whether the present action will impair or impede Morton's ability to protect its interest.

The issue as to intervention as a matter of right, as thus narrowed for purposes of this proceeding, is essentially the same as the issue of indispensability. Thus, if Morton is entitled to intervene as a matter of right, for all practical purposes it is indispensable; and if Morton is indispensable, then for all practical purposes it is entitled to intervene as a matter of right. Since July 1, 1966, the criteria for either determination are pretty much interchangeable.

However, it will be shown in this brief that the criteria to be used by the court, with respect either to intervention as a matter of right or in determining indispensability, are strictly practical considerations which are viewed in light of the facts of each particular case. Properly applied, such an evaluation and deter-

mination wholly within the sound discretion of the court should not permit intervention by Morton.

POINT I.

THE STATE OF UTAH HAS NOT CONSENTED TO SUIT BY MORTON IN THE PRESENT LITIGATION.

The Eleventh Amendment to the United States Constitution provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Morton is a citizen of the State of Delaware and it is clear that intervention by Morton would constitute a claim against the State of Utah. It makes no difference that Morton in *form* seeks simply to intervene as a defendant and merely to "answer" the complaint of the State of Utah when in truth and fact the real substance of the answer proposed by Morton is a denial of the title claimed by the State of Utah and a claim by Morton of ownership in itself to the same lands. The nature of Morton as a party must be determined by the essential nature and effect of the position Morton occupies in the proceeding, rather than by the formal designation of Morton as a defendant. *In Re Ayers*, 123 U.S. 443, 490-508 (1887); *Ex parte New York*, 256 U.S. 490, 497-502 (1921); *Worcester County Trust Co. v Riley*, 302 U.S. 292, 296-98 (1937); *Ford Motor Co. v Department of Treasury of Indiana*, 323 U.S. 459, 364 (1945).

While one or two lower courts have supposed that a sovereign may impliedly immunity by instituting an action, the Un Supreme Court has never so held. In fact opposite has been the express holding of th Court and the great majority of lower cour *States v. Sherwood*, 312 U.S. 584 (1941); *Schild*, 161 U.S. 10, 16 (1896); *Stanley v.* 147 U.S. 508 (1893); *Nassau Smelting & Works, Ltd. v. United States*, 266 U.S (1924); *Carr v. United States*, 98 U.S. 433, Perhaps the lower federal courts have had quent occasion to apply the rule announ Supreme Court. Thus, if the government br demnation action to quiet title to land, it do sent to suit by one who wishes to intervene title. *United States v. 706.98 Acres of La* Supp. 272 (W.D. Ark. 1957). See Also *U v. Dry Dock Savings Inst.*, 149 F.2d 91 1945); *United States v. Great Northern* Supp. 651 (D. C. Mont. 1940), affirmed *su Donald v. United States*, 119 F.2d 821 (9th modified on other matters and affirmed, *G ern Ry. v. United States*, 315 U.S. 262 (194 *Oil & Refining Co. v. Sun Oil Co.*, 190 F. (5th Cir. 1941); rehearing denied, 191 F.2d cert denied, 342 U.S. 920 (1952).

The cases cited in the paragraph nex relate directly to the question of an implie the United States, but actually apply with to the question of an implied waiver by t Utah. Those cases have been cited under t

show that Utah has not impliedly consented to be sued, but they are also intended to apply to Point II, next succeeding, to show that the United States has not impliedly consented to be sued. With this explanation, those cases will not be cited further under Point II. Suffice to say, in conclusion of Point I, that the answer which Morton seeks to file obviously constitutes a claim against the State of Utah, which claim is barred by the Eleventh Amendment above quoted. The State of Utah cannot be subjected to such claim unless it clearly has granted consent to be so sued, and it has not granted such consent.

POINT II

THE UNITED STATES HAS NOT CONSENTED TO SUIT BY MORTON IN THE PRESENT LITIGATION.

It is clear from the content of Morton's proposed answer that it claims lands which are also claimed by the United States as well as by the State of Utah. The United States has not consented to suit by Morton in this litigation, unless it can be contended that the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349 (hereinafter referred to as the Great Salt Lake Lands Act) constitutes such consent. But Section 2 provides that the provisions of the act would not affect "any valid existing rights or interests, if any, of any person, partnership, association, corporation or other nongovernmental entity, in or to any of the lands within the below said meander line, . . ."

The act then provides in Section 5 that Utah may elect to make an outright purchase or to litigate and

then purchase the ownership interest, if any, of the United States. If Utah elects to litigate, it is provided that the State of Utah may maintain an action in the Supreme Court of the United States and consent is given to join the United States as a defendant. There is nothing in that act which contemplates or remotely suggests that consent is given for the United States to be subjected to any suits or claims by anyone other than the State of Utah. Morton certainly would not have been indispensable to the outright purchase option, and the end result of the litigation option will be identical to the outright purchase option, at least to the extent that Utah will, in either event, obtain any interest of the United States. Morton will not be harmed any more by litigation than it would have been by an initial purchase. The fact is that it would not be harmed at all by either course of action.

But this argument, at least at this point, is not directed to the issue of whether Morton would be harmed by any final decree in the pending litigation, but is intended to show that the congressional intent was simply to involve only Utah and the United States — and no other parties — in either the outright purchase option or the litigation and purchase option.

The statutory language is therefore clear that no private claims can be affected by any provision of the act, or by any purchase or litigation thereunder. The act grants consent for suit by the State of Utah against the United States, but for no other suits or claims against the United States. Morton would seek the exact opposite, *i.e.*, to intervene in the litigation pro-

vided for by the act and to obtain a direct adjudication affecting its private claims.

The congressional hearings held with respect to S. 265 and H.R. 1791 and H.R. 6267 make clear that the express intent was that the litigation authorized by the act would include only the State of Utah and the United States, and that private claimants would not be involved in any event and their interests would in no wise be affected.

Published congressional hearings are, of course, admissible to ascertain legislative intent, and, more particularly, the expressed intent of the sponsor or draftsman of the bill deserves particular attention. See, generally, 2 Sutherland, *Statutory Construction*, Section 5009, pp. 495-98 (3d Ed. 1943).

At pages 91-92 of the published Hearings before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs concerning S. 265 (Eighty Ninth Congress, First Session), the following exchange occurred between Senator Frank E. Moss, *sponsor* of the bill, and Earl J. Knudson, president of the Great Salt Lake Lands Association (an organization of private claimants):

> Senator Moss. Thank you, Mr. Knudson. I corresponded with Mr. Adams and I know he does have great information about the lake. One thing that troubles me a little here is that the bill has been drawn by the Legislative Counsel, and by the land board and by me, and by everybody involved, to try to eliminate absolutely this private ownership matter. It says:

Provided, however, That the provisions of this Act shall not affect—
Shall—that is mandatory—

Shall not affect any valid existing rights or interests of any person, partnership, association, corporation, or other non-governmental entity in or to any of the lands within and below said meander lines and also within the Bear River Migratory Bird Refuge.

Now what we have tried to do and what I think the language—and if you can tell me how to make it more mandatory than that—I would be glad to entertain the suggestion, is to eliminate this question of any kind of derogation of any title that any private owner has by this legislation. Now if we get into discussion of problems that private owners have had in times past or so, we are not talking to the subject because this bill excludes all of that.

So that is out. We are not doing anything to that. We are just trying to solve a problem that is existing between the State Government and the Federal Government. I am not sure that your testimony is particularly to the point in this.

Similary, at pages 63-64 of the published Hearings before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs concerning H.R. 1791 and H.R. 6267 (Eighty Ninth Congress, Serial No. 89-32), the following exchange occurred bebetween Rep. David S. King, one of the sponsors, and Robert S. Campbell, Jr., legal representative of the Island Ranching Company (a private claimant):

Mr. King: On the matter of the title, I am sure you are aware, and I will repeat it for the record, that the bills that we are considering contain this very specific language:

> *Provided, however,* That the provisions of this Act shall not affect any valid existing rights or interests, if any, of any person, partnership, association, corporation or other non-governmental entity in or to any of the lands within and below the said meander line.

So that the position, at least the position of the sponsor of one of these bills, myself, I assume I speak for my distinguished colleague, is that we do not in any way presume to interfere with the title, if any, to the abutting private owners. And as you, yourself, pointed out and I agree with you wholeheartedly, we don't have the right to interfere with that even if we wanted to because certainly the Constitution would guarantee the preservation of those rights. And it would take more than an act of Congress to deprive your client of any vested rights without due process of law. I would like to make the record abundantly clear that this bill does not contemplate divesting any private landowners of any vested rights which they might have. The bill takes no position and I take no position as to whether these private abutting landowners do or do not have rights. This is something which the courts eventually will determine. *But the feeling of this person is that in the meantime we should settle the conflict between the State and the Federal claims to this land. At least, that much can be done now and then adjudicating the rights of the private landowners is something that could take its time, and no doubt will be done.* (Emphasis added.)

There is not the slightest suggestion in the language of the Great Salt Lake Lands Act or in the published congressional hearings relating thereto that Congress intended to subject the United States to claims by

private persons in the litigation authorized by the act. The exact opposite is clearly expressed.

Congressional consent is required before suit can be maintained against the United States in an original action, even when a state is the claimant. *Arizona v. California,* 298 U.S. 558 (1935); *Kansas v. United States,* 204 U.S. 331 (1906); and *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). It is equally clear that such consent statutes must be express, and they will be narrowly construed. *Price v. United States,* 174 U.S. 373 (1899), and *McMahon v. United States,* 342 U.S. 25 (1951). With respect to implied consent, see cases cited at page 5, *supra.*

Even though the United States did not elect to raise the question with respect to lack of consent by the United States to the claim sought to be asserted by Morton, the question is jurisdictional and may be raised by any party or by the Court. *Minnesota v. Hitchcock,* 185 U.S. 373 (1902).

POINT III

THE JURISDICTION OF THE UNITED STATES SUPREME COURT IN ORIGINAL ACTIONS DOES NOT EXTEND TO SUITS BETWEEN A STATE AND CITIZENS OF THE SAME STATE.

The judicial power which the people, through the United States Constitution, conferred on the federal judiciary is found in U. S. Const. art. III, § 2, which provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls,—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

It has been repeatedly held that the first paragraph above quoted *confers* the judicial power and the second paragraph simply *distributes* the judicial power conferred by the first paragraph, but does not confer any additional judicial power. The second paragraph distributes the judicial power into *original* and *appellate* jurisdiction. Original jurisdiction in the United States Supreme Court is dependent on the *character* of the parties, and this category includes those cases in which a state is a party. The other category of jurisdiction is appellate, and includes all other cases where judicial power is conferred but where jurisdiction is not original.

The first paragraph of Section 2, in granting the

judicial power, essentially makes a division between the *subject matter* of the cases over which the federal court shall have jurisdiction and those cases where the *character* of the parties will be sufficient to sustain jurisdiction. The former class of cases includes those which arise under the Constitution, laws and treaties of the United States (to the extent that such cases will succeed or fail, depending on the construction or interpretation given to the pertinent provision of the federal constitution, statute or treaty). The latter class of cases includes controversies where states are involved, including those between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens or subjects — but not between a state and its own citizens.

With respect to the grant of judicial power where the *character* of the parties is sufficient to sustain jurisdiction, it must be emphasized that there is no grant of judicial power for controveries between a state and its own citizens. On the other hand, in the class of cases where the *subject matter is controlling* (when such cases arise under a provision of the federal constitution or a federal statute or treaty), it makes no difference who the parties are. There is judicial power and jurisdiction in the federal courts over cases between a state and its own citizens when, but only when, it is necessary to construe a federal constitutional, statutory or treaty provision.

This is to say that there is no jurisdiction at all in any federal court between a state and its own citizens if jurisdiction must depend on the *character* of the state as a party to sustain jurisdiction, because the only juris-

diction in federal courts between a state and its own citizens would be when jurisdiction is dependent upon the nature of the subject matter.

Since the second paragraph of § 2, Article III of the United States Constitution, as quoted above, distributes the jurisdiction of the United States Supreme Court so as to make such jurisdiction *original* when it is dependent upon the character of the parties, it must necessarily follow that there can never be such an original action between a state and its citizens when the basis of jurisdiction would be dependent upon the *character* of the state as a party. Likewise, it must necessarily follow that when the *subject matter* of a case sustains jurisdiction between a state and its own citizens, such jurisdiction is *appellate only* in the United States Supreme Court, and such cases must, therefore, *originate* in the *lower federal courts* and only reach the United States Supreme Court on appeal. Original jurisdiction is implemented by 28 U.S.C. § 1251.

In summary, Article III, Section 2 of the United States Constitution is a direct grant and limitation with respect to the jurisdiction of this Court in original actions, and it is obviously beyond the power of Congress to enlarge the federal constitutional limitation on original jurisdiction. *Marbury v. Madison,* 1 Cranch 137, 173-74 (1803).

The jurisdictional limitation now under discussion is quite different from the jurisdictional question relating to whether the State of Utah or the United States has consented to suit, as discussed under Points I and II above. For even if it should be determined that both

the State of Utah and the United States have consented to be sued through the claims which Morton seeks to assert in its answer, this Court would be without jurisdiction to allow citizens of the State of Utah to intervene as indispensable parties in any form or fashion which would result in a claim by them being asserted against the State of Utah. Morton is in essentially the same position as other private claimants, and the Office of the Solicitor General specifically stated in letters directed to the Special Master, Honorable J. Cullen Ganey, under dates of September 20 and October 26, 1967, that all private land claimants are in the same position as Morton insofar as they would be indispensable parties to this action. By far the majority of such private claimants are citizens of the State of Utah and if Morton were to be permitted to intervene as an indispensable party, then all private claimants would have to be brought in as indispensable parties, and the present litigation would then necessarily assume the complexion of a great many of the citizens of the State of Utah claiming against the State of Utah, and the State of Utah likewise claiming against many of its own citizens. That result would totally defeat the jurisdiction of this Court and the Court would be duty bound to dismiss the action at that point for lack of jurisdiction.

Cohens v. Virginia, 6 Wheat. 264 (1821); *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824); *Florida v. Georgia*, 17 How. 478 (1854); *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553 (1870); *Florida v. Anderson*, 91 U.S. 667 (1875); *Hans v. Louisiana*, 134 U.S. 1 (1889); *United States v. Texas*, 143 U.S. 621

(1892); *California v. Southern Pacific Company*, 157 U.S. 229 (1895); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Minnesota v. Northern Securities Company*, 184 U.S. 199 (1902); *New Mexico v. Lane*, 243 U.S. 52 (1920); *Texas v. Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1921); *Louisiana v. Cummins*, 314 U.S. 577 (1941); 2 Willoughby on the Constitution of the United States, § 823, p. 1924 (2d ed. 1929); 2 Watson on the Constitution, pp. 1126-27 (1910).

Thus, without regard to any ruling which this Court might make as to whether the State of Utah and the United States have consented to be sued by Morton and the other private claimants, a determination that any private claimants who are citizens of Utah are indispensable parties would oust this Court of jurisdiction to consider any phase of the litigation.

POINT IV

THE QUESTION OF INDISPENSABILITY IS DETERMINED BY PRACTICAL CONSIDERATIONS.

No fixed rule or rigid formula can be framed to apply to every case to determine whether a person is indispensable. Each case must be judged in light of its particular facts, and the court must determine in light of all of the relevant practical considerations whether the person in question claims rights so inseparably connected with the issues in litigation so as to make it impossible to proceed to any useful decree. In all respects the determination by the court is strictly discretionary.

The question of indispensability is not a question of jurisdiction, but is simply a concept created by courts of equity to determine when the court ought not proceed with litigation when certain parties who ought to be before the court have not been joined or cannot be joined. There has been much discussion with respect to the utility of the indispensable party doctrine, but, whether it is desirable or not, the fact remains that it still exists and frequently must be considered by the courts. In order to arrive at a proper determination of the criteria and considerations which should be viewed by the courts in determining indispensability, a review of the reasons for the 1966 revision of Rules 19 and 24 is most helpful.

Prior to 1780, there was no such concept as an indispensable party, but thereafter courts of equity began to shape a doctrine that ultimately was recognized as the indispensable party doctrine. Critical of the evolution of that doctrine, as well as its current usefulness, Professor Geoffrey C. Hazard, Jr. has written an excellent account of the growth of the doctrine and has suggested reasons why it should be abandoned. Hazard, *Indispensable Party: The Historical Original of a Procedural Phantom*, 61 Col. Law Rev. 1254 (1961). At pages 1255-56, Professor Hazard observes:

> During the seventeenth and eighteenth centuries, Chancery developed fairly workable necessary party rules, with exceptions designed to meet practical convenience and necessity. These rules may be summarized as follows:
>
> 1. All persons who are interested in a controversy are necessary parties to a suit involving

that controversy, so that a complete disposition of the dispute may be made.

2. Joinder of necessary parties is excused when it is impossible, impractical, or involves undue complications.

3. A person who is not a party, unless represented by one who is a party, is not bound by a decree.

In about 1780 and the three decades that followed, a confused series of opinions were rendered which attempted to establish an additional rule: no decree that does not completely dispose of the controversy will be entered. Upon this rule is founded the indispensable party notion. It was conceived in dictum and lives by inertia. It should long since have been laid to rest.

Perhaps the best and most exhaustive analysis of how the indispensable party doctrine has caused some terminological confusion in court decisions and among some writers, is Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. Law Rev 327, 484 (1957). This article has oft been cited in complimentary fashion by courts and text writers, as well as by the Advisory Committee (with respect to the 1966 revision of Rule 19). Several excerpts from the article are included herein, but the footnotes are omitted. The basic considerations for joinder are summarized by Reed as follows:

* * * There are three classes of interests which may be served by requiring the presence of additional parties in an action: (1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice. Probably no catalog of cases

> upon the basis of such a classification can be made because few cases are explicit in this regard and many represent an indistinguishable mixture of two or all three of these interests. Nevertheless, clear thinking will be materially aided if it is remembered that the real problem in any compulsory joinder case is whether the initial choice of parties by the plaintiff is to be overborne by some combination of these three countervailing interests — not by a blind adherence to an elderly formula. (page 330)

It is further pointed out by Professor Reed that in many instances it is more desirable to do justice "by halves" than to do no justice at all:

> * * * the courts should be kept free to handle meritorious litigation. There is plain economic waste in duplicate litigation. If it can be made to appear to a court that a controversy presented to it will not be completely settled in A's absence, the court is clearly justified in inquiring whether it ought to require A's presence, or, lacking it, to dismiss the case. It will be observed immediately, however, that by nature minimizing litigation and conserving courts' energies are relative values to be weighed with other values in the scale of justice. "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems." The equitable policy of doing justice "entire and not by halves" can be made to yield to countervailing factors which are more pressing. The mere fact that a second action may be required to determine the totality of issues involved in a controversy is not a bar to the maintenance of the incomplete first action. (page 335)

And further:

> This other principle arises out of the fact that although it is important to determine a controversy in one package where possible (and all thinking here must be conditioned by the need and desire to conserve judicial resources), in some cases plaintiff will not be able to assert his claim at all if not permitted to do so in the absence of some "interested" parties. The existence of this situation is a factor which should prompt the court to proceed to a hearing and determination of the case if it possibly can do so. Courts exist for the determination of disputes among the people; in a particular litigation there is an obligation on the court to make a meaningful determination if at all possible. Because the law grants almost no choice between the use of courts of law and forcible rectification of wrongs done, it seems to follow that the sovereign is under a correlative obligation to provide a reasonably effective mechanism for dispute settling, not only in general but in particular cases. The fact that unavoidably there may be required two or more actions to dispose of a dispute should not preclude the court from considering the case, despite the inclination to avoid repetitive litigation. If only through multiple suits can justice be done, there is nothing inherent in our judicial system forbidding those several suits. Minimization of litigation is not an end in itself, and it has its price. **(pages 336-37)**

Professor Reed emphasized that, if at all possible, the court should proceed in the absence of a person who cannot be brought before the court, if the decree can be shaped so as to give the plaintiff at least part of the relief prayed for:

> * * * If plaintiff is willing to forego his claim against A, at least temporarily, what reason is there for withholding adjustment of claims

among the parties present? The absolute barrier in the case involving A alone is lacking here, and it is a blind justice which can see in this instance no method of (and no reason for) granting plaintiff as against defendants in court whatever relief he seems entitled to. If the decree can be shaped to give the plaintiff at least some of the relief he desires while protecting A's interests, the court ought to proceed with the case.

In short, a court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to *avoid an adverse factual effect on the interests of absent persons;* on the other is the policy of seeking to *give a petitioner as much merited relief as possible.*

* * *

As to the second principle, instead of emphasizing a court's desire to do justice entire rather than by halves — both to avoid double vexation and to conserve judicial resources — the proposed statement calls attention to an obligation on the court to try to devise a way to proceed in the excusable absence of A if, otherwise, plaintiff will be unable to obtain a judicial determination of the controvery between himself and defendant. This does not abandon the historic, almost axiomatic concern for minimizing the quantity of litigation. But emphasis on reducing the number of adjudications is not needed in cases troubled by questions of required joinder. The need rather is for recognition of the possible inability of the plaintiff to proceed at all, anywhere, if foreclosed here. (pages 338-39)

Professor Reed cites *Hicks v. Southwestern Settlement and Development Corporation*, 188 S.W.2d 915 (1945), as an ideal example of using the pragmatic approach in determining indispensability. In that case

a number of tenants in common brought an action for ejectment and damages, claiming title to lands from which oil and gas had been withdrawn by defendants. The pertinent issue was whether a substantial number of persons who were tenants in common with plaintiffs, but who were not parties to the action, were indispensable. The court pointed out that 63 of the absent tenants in common were residents of at least four additional states, that some were minors, and that some addresses were unknown. Further, the court mentioned that there were at least 512 other tenants in common about whom the record was silent as to their residence. Referring to the court's enumeration of the complexities and practical difficulties if all of the tenants in common were to be brought into the litigation as justification for finding the absent persons not indispensable, Professor Reed observes:

> Here exemplified is the very approach suggested throughout these materials. *This* is the way to do it! Recognition is given to the pressing need to conclude the controversy as neatly and expeditiously as possible. Defendants must be protected from repetitive litigation, if possible. But the countervailing factor is the tremendous difficulty, if not impossibility, of obtaining the presence of all interested — numbering in the hundreds. The court's opinion, which is long, contains some discussion of the nature of the rights involved. The court does conclude that the rights of the tenants in comman, although technically several, are joint within the meaning of the rule that persons having a joint interest shall be made parties, and that all else being equal there is much force in defendants' position that the suit should be abated unless all are joined. But all else is not equal; indeed, the

> force of the difficulty argument outweighs, and plaintiffs are permitted to proceed without their fellow tenants. (pages 492-93)

Selecting another example of an effective, pragmatic approach in balancing the interests to determine indispensability, Reed comments on *Ambassador Petroleum Company v. Superior Court*, 208 Cal. 667, 284 Pac. 445 (1930):

> * * * The state of California sought under statute to enjoin some forty-two operators (lessees) in an oil field from committing unreasonable waste of natural gas. In the cited action the operators made application for a writ of prohibition to restrain the proceedings until the lessors of the land be joined, for the asserted reason that the lessors' royalties on production would be affected. Although suggesting by way of dictum that a different rule would apply in purely private disputes, the court held that the lessors were not indispensable even though they would be "bound" by the ruling.
>
> * * *
>
> The court did not stumble over concepts of inseparability of rights or over lack of power to determine the legal position of absent parties. Instead, it appears to have weighed the importance of protecting the public interest, as expressed in the conservation law, against the importance of protecting the interests of absent owners, and to have found that the former overbalanced the latter. Whatever possibility there was of bringing in the absentee owners by constructive service of process was apparently overcome by the impracticability of citing in so large a number. The court's method here is commendable. Although there was the possibility that absent persons would be adversely affected fac-

> tually — and this usually serves to bar consideration of the case — that possibly was outweighed by the need for gas conservation. When the court stated that a different result might obtain in purely private disputes, that simply was recognition that in the absence of the public interest in conservation there would be no compelling reason for proceeding without the owners. It is not to say that the court's power is diminshed or its discretion shackled. (pages 498-501)

Reed, again emphasizing that a court should give every possible consideration to providing some relief for plaintiff by shaping its decree so as to protect absent persons, observes:

> * * * As indicated repeatedly above, a court should consider carefully the harm which may be done to the interest of an absent person, and it should avoid making meaningless and incomplete determinations; but it must seek also to avoid a ruling which serves, in effect, to deprive a plaintiff of all opportunity for a judicial determination of the merits of his claim. If plaintiff clearly has a remedy elsewhere should he seek to pursue it, it is not especially serious if he be sent out of this court for non-joinder of A; and it should not require much of an adverse effect on A to cause the court, on motion of a party or sua sponte, to move to protect A by ordering him joined on pain of dismissal of the action. But if the plaintiff likely cannot maintain his action elsewhere — due to limitations on the jurisdictional reach of the various courts — then the court ought to consider every means available to retain his case for adjudication, including a careful weighing of the likelihood of factual injury to A's interest and its relative value, and a consideration of the possibility of shaping a decree to grant plaintiff as much merited relief as

possible while safeguarding A's interest. (page 523-24)

Professor Reed's brief conclusion to his 104 page article is the following:

> If one accepts Dean Pound's theory that our legal system in development alternates between strict rule and formula on one hand and informality and judicial discretion on the other, and that contemporary jurisprudence is in one of the liberal, more flexible eras, our thesis is, at very least, riding the pendulum; and one gains if only from realizing that labels no longer determine outcomes. It may not be fruitless to catalog cases to show, e.g., that courts often call junior mortgagees necessary or indispensable in foreclosure suits, or that joint obligees are required to sue together; most cases fit into the general pattern. But no lawyer worth his calling can afford to forget for one moment that such lists give rise to little more than a presumption. *There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence.* The descriptive term assigned to him is irrelevant to the process of decision. (pages 537-38) emphasis added)

The Advisory Committee in its 1964 preliminary draft of the proposed revision to Rule 19 considered dispensing with the indispensable party doctrine, but concluded that it was untenable to do so. See, *e.g.*, 3 *Moore's Federal Practice*, par. 19.01 (4.-1), page 2107. Rule 19 (a), prior to the July 1, 1966 revision, provided as follows:

> (a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made

parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

Rule 19, (a) and (b), as now revised, provides as follows:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a

> judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The Committee Note of 1966, relative to the revision of Rule 19, is rather clear in demonstrating that the revision was intended to require courts to make a realistic, pragmatic, practical evaluation of the actual fact situation in each case to determine whether some relief could be granted without substantial injury to absent persons. In this regard, and as acknowledged by the Committee, the pragmatic approach suggested by Professor Reed has now been adopted by Rule 19. Representative extracts from the Committee Note of 1966, as printed in 3 *Moore's Federal Practice*, pp. 2109-14, are set forth below:

> Whenever feasible the persons materially interested in the subject of an action — see the more detailed description of these persons in the discussions of new subdivision (a) below — should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished — a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue — the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

Failure to point to correct basis of decision. The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible. In some instances courts did not undertake the relevant inquiry or were misled by the "jurisdiction" fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated by the shaping of final relief or other precautions.

* * *

When a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed. That this decision is to be made in the light of pragmatic considerations has often been acknowl-

> edged by the courts. See *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Niles-Bement Pond Co. v. Iron Moulders' Union*, 254 U.S. 77, 80 (1920). The subdivision sets out four relevant considerations drawn from the experience revealed in the decided cases. The factors are to a certain extent overlapping, and they are not intended to exclude other considerations which may be applicable in particular situations.
>
> * * *
>
> The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

A further indication of the current emphasis on considering the practical factors of each case individually to determine indispensability is found in Barron and Holtzoff, 2 Federal *Practice and Procedure*, Sections 511-12, pp. 25-29 (1967 Pocket Part). The following quotations are illustrative:

> Rule 19 was completely rewritten in the 1966 amendments of the rules. Here, as with Rule 23, "a restructuring of major proportions" was necessary "to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." Accordingly the time-honored categories of "indispensable," "necessary," and "proper" have been discarded and that portion of the text in the main volume which defines them is no longer of relevance. The concern of the amended rule is with the practical realities of joinder.
>
> * * *

> Rule 19 was completely rewritten in 1966. The former text of the rule was defective in many respects, as is pointed out in the text of the main volume and elsewhere. It purported to speak in rigid legal categories, when what is in fact involved is a discretionary balancing of conflicting interests. The new emphasis of the amended rule is evident even from the title, which speaks of "Joinder of Persons Needed for Just Adjudication," where the old rule spoke of "Necessary Joinder of Parties." The new rule will produce a change of method, more than of result. Probably most cases will be decided the same way under the new rule as under the old, but the new rule requires the court to face squarely the pragmatic considerations which properly should be controlling.

It is uncertain whether or to what extent the indispensable party doctrine has now become one of substance rather than procedure. But that distinction appears not to be critical to the case at bar. While the rule unquestionably was created as a rule of procedure by the courts of equity, it subsequently was mistakenly considered in a number of cases in relation to various concepts of constitutional due process. Recently, in *Provident Tradesmens Bank and Trust Company v. Lumbermens Mutual Casualty Co.*, 365 F.2d 802, (3d Cir. 1966, cert. granted 386 U.S. 940, 1967), the court held the doctrine to be substantive, and beyond the provisions of Rule 19 (although a persuasive dissenting opinion argued to the contrary). The majority opinion in *Provident* has been rather generally criticized by the law reviews. See, *e.g.*, *Federal Rules of Civil Procedure —Rule 19 and Indispensable Parties*, 65 Mich. Law Rev. 968 (1967) and *Note*, 80 Harv. Law Rev. 678

(1967). Moore, differing with the "substantive" view taken by the court in *Provident*, said the distinction may be essentially one of semantics, because:

> Substantive law, federal or state, as the case may be, will determine the rights and interests of the parties before the court, their interrelationship, and the relationship of those rights and interests to those of persons not before the court. Those substantive rights, interests and relationships evaluated, the court then must determine in the light of procedural due process, fair judicial administration, and the criteria set forth in Rule 19 whether it can proceed with the parties before the court or whether there is an indispensable party that is not before the court. In the latter event, unless he can be and is made a party, the action should be dismissed. Moore, *op cit., supra*, at page 2120.

Having shown that the determination of indispensability is one of practical consideration, rather than rigid rule or formula, it is advisable now to show that a determination of intervention as a matter of right is controlled by essentially the same considerations. Rule 24(a), relating to intervention, prior to its revisions permitted one to intervene as a matter of right only when he would be *bound* by the judgment and was not adequately represented in the action. The question as to whether one would be bound was interpreted to mean that the judgment would have to be *res judicata* as to him. *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). The July 1, 1966 revision of Rule 24(a) relaxed the requirement of being "bound" in the sense of *res judicata*, and provided for intervention as of right for one who "is so

situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." The present text of Rule 24(a) is as follows:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In Barron and Holtzoff, *op cit*, supra, at page 122, the authors note the impractical construction placed on Rule 24 prior to its revision, and then comment on the result to be achieved from the revision:

> In 1966 Rule 24(a) was amended by striking subdivisions (2) and (3), and substituting a new subdivision (2) which permits intervention as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest unless the applicant's interest is adequately represented by existing parties." The emphasis on the practical effect of the action, rather than its conceptual res judicata effect, will resolve the dilemma created by the Supreme Court's construction of the existing rule.

The Advisory Committee commented that the desired result to be achieved from Rule 24(a) as revised was to require consideration of the same practical factors required by Rule 19 as revised. The Advisory Committee's 1966 Note to Rule 24(a), quoted in Moore, *op cit, supra*, Vol. 4 at page 7, contains the following explanation:

> The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical considerations, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict consideration of res judicata. * * *
>
> An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.

The Committee thus observes that under Rules 19 and 24 as revised, a person desiring to intervene as a matter of right will be subjected to the same evaluation as that used to determine whether a person is an indispensable party. But this probably also was true, at least to a large extent, under Rules 19 and 24 prior to their July 1, 1966 revision. See Reed, *op cit, supra*, at page 529, note 382.

Perceiving no sound reason for making any major distinctions in the case at bar as to Morton's "intervention as a matter of right" and Morton's position

as an "indispensable party," since the practical considerations are the same, the analysis in this brief will proceed to follow the cases relating to indispensable parties, since that is the approach Morton has selected.

The major cases relating to the indispensable party doctrine have examined each case with respect to the competing equities, both before and after the rules revision in 1966. The general criticism leveled at the decisions prior to the 1966 revision was not that such decisions were incorrect, but that sometimes the courts used contradictory and confusing terms in referring to the doctrine as "jurisdictional" and in talking in terms of fixed rules. It will now be demonstrated, however, that the United States Supreme Court, and most inferior courts, have for many years used the pragmatic approach suggested by the text writers, the Advisory Committee, and the text (and spirit) of Rules 19 and 24 as revised.

The question of whether a party is indispensable is determined on the facts of each particular case, and this Court announced that fundamental proposition in the landmark case of *Shields v. Barrow*, 58 U.S. 130 (1854). It was there made clear that there is no prescribed formula for determining in every case whether a person is an indispensable party.

Even prior to the *Shields v. Barrow* decision, this Court had made clear that the indispensable party doctrine was one that had been created by the courts and its use and application were matters for judicial discretion. Thus, in *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-67 (1825), Chief Justice Marshall, speaking for the Court, said:

> It is contended that he [plaintiff] is a tenant in common with others, and ought not be permitted to sue in equity, without making his cotenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. Courts of equity require, that all parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. *This equitable rule, however, is framed by the court itself, and is subject to its discretion.* (Emphasis added).

This Court has also emphasized that one of the practical considerations which must be given substantial weight is whether plaintiff has available another forum in which to seek relief. If not, and if to classify an absent person as an indispensable party would defeat the jurisdiction of the court, then every attempt should be made to frame the decree in such a manner as to do justice between the parties before the court. In *Payne v. Hook*, 7 Wall. 425, 431 (1868), this Court explained the reason for the rule:

> But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject-matter of the suit should be made parties to it; but this rule, like all general rules, being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, equally interested in the litigation, but who cannot conveniently be made parties to the suit.
>
> The necessity for the relaxation of the rule is

> more especially apparent in the courts of the United States. where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.

Even if it should appear that an absent person might have rights that ordinarily would be injured or impaired by the relief requested by plaintiff, a court of equity will strive to shape its decree so that the rights of such absent persons are preserved. If this can be done, the court will proceed to a decree and the absent persons will not be deemed indispensable. This is explained in *Waterman v. Canal-Louisiana Bank Company*, 215 U.S. 33, 49 (1909):

> The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the courts without injuriously affecting the rights of such absent party. 1 Street's Fed. Equity Practice, § 519.
>
> If the court can do justice to the parties before it without injuring absent persons it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons.

A most perceptive effort to shape a decree so as to protect absent persons is reflected in *Roos v. Texas Co.*, 23 F.2d 171 (2d Cir. 1927). In this case Judge Learned Hand considered a number of procedures which might be followed in shaping the decree, but

was compelled to conclude that no approach would be adequate because of the uncertainties involved (plaintiff sought to recover moneys due from defendant, but plaintiff's attorneys, who were not parties, had a lien priority to the extent of a one fourth interest in the proceeds sought to be recovered). Before considering alternative methods of shaping the decree, Judge Hand recognized that such efforts should be made in light of the facts of the particular case. At page 172 of the opinion Judge Hand observed:

> In many decisions, it has been laid down that the test is one of substance; that is, whether the plaintiff can obtain relief which will later leave open to the absent parties the effective assertion of their rights [citing *Shields, Payne, Waterman,* and other decisions]. The general statement does little to advance matters, until one knows what is the test by which to ascertain when such rights can be protected and when not, *and this we understand to be an entirely practical question, dependent in each case upon the facts.* (Emphasis added).

In affirming dismissal, Judge Hand observed that other forums were available where the issues in dispute could be fully adjudicated among all interested persons.

Other federal cases, though not involving original actions in this Court, have followed the same principles established in the cited opinions of this Court. Thus, in an action by an oil and gas lessee against a party claiming an interest in the leasehold property, it was held that the lessor was not an indispensable party to the litigation even though his presence would be necessary for a complete adjudication of all the questions involved in the litigation. However, the plaintiff sought

no relief against the lessor and the decree was carefully limited in its legal effect to the parties before the court. *Texas Co. v. Wall,* 107 F.2d 45 (1939). See, also, *Lubin v. Chicago Title and Trust Co.,* 260 F.2d 411 (1958). Also, it has been held that one tenant in common could maintain a suit to enjoin the infringement of his water rights without joining his co-tenant. *Union Mill & Mining Co. v. Dangberg,* 81 F. 73 (1897). Compare *Humble Oil and Refining Co. v. Sun Oil Co.,* 190 F.2d 191 (1951). And of particular interest is *McArthur v. Rosenbaum Co. of Pittsburgh,* 180 F.2d 617 (3d Cir. 1950), wherein the court held that certain owners of real property were not indispensable, even though indirectly affected, when the decree could be granted and limited to the parties actually before the court.

The only case cited by Morton in its brief in support of its position as an indispensable party which bears any reasonable resemblance to the case at bar is *California v. Southern Pacific Company,* 157 U.S. 229 (1895). So far as the jurisdictional question therein encountered is concerned, the case is strictly in point; but with respect to the question of indispensable parties, the case is clearly distinguishable for a number of reasons. First, the California state courts afforded an alternative forum. Second, California as plaintiff sought a complete title adjudication, quieting title in itself as against absent parties (157 U.S. 229, 230, 235). Third, to determine the rights of the Southern Pacific Company, it would have been necessary to adjudicate directly upon the rights of the City of Oakland (an absent person), since the Southern Pacific Company

derived its claim of title through Oakland and Oakland still claimed ownership interests. Fourth, the Court specifically noted that the California Legislature had not authorized the bringing of the action, contrasted with the specific enactment of the Utah Legislature in this case.

It must be recognized that, so far as the indispensable party question is concerned, the *California* case bears very little resemblance to the case at bar, because in this case Utah seeks only a determination of the federal interest, if any. While the complaint alleges ownership in Utah so as to defeat the claims of the United States, it is obvious from the prayer of the complaint that Utah seeks no adjudication which could affect or injure Morton. The prayer, at pages 11-12 of the complaint, reads as follows:

> WHEREFORE, plaintiff prays:
>
> 1. That a decree be entered by this Court quieting title in the State of Utah as against any and all claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest whatsoever to any part of said land or minerals located therein or any part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting any right, title, or interest in or to any of said land or minerals or any part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

2. That this Court appoint a master to hear and consider all admissible evidence relating to the claims of ownership and to make his findings and recommendations to this Court.

3. For such other and further relief as this Court may deem proper and necessary in these premises.

The State of Utah has claimed only against the United States. Against Morton no relief has been asked and Morton is not indispensable. As this Court observed in *Payne v. Hook*, 7 Wall. 425, 432 (1868):

> It can never be indispensable to make defendants of those against whom nothing is alleged and from whom no relief is asked.

And, as observed by Professor Reed, *op cit, supra* at 538:

> There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence.

POINT V

THE PRACTICAL CONSIDERATIONS IN THE CASE AT BAR OVERWHELMINGLY SUGGEST THAT THE LITIGATION SHOULD PROCEED WITHOUT MORTON.

Having concluded that it is within the sound discretion of this Court to determine whether Morton is indispensable, and having further concluded that such discretion is to be exercised after viewing all relevant considerations of a practical and equitable nature,

it now becomes necessary to examine the particular facts of the case at bar. This is perhaps best accomplished by itemizing the major equitable factors which make the instant case strikingly unique and which present a compelling argument for continuing the litigation in the absence of Morton.

A. The Nature of the Controversy is Highly Unusual.

The Great Salt Lake, in and of itself, is unique. While not the only "dead sea" in the world, it is the only inland salt sea where the slightest fluctuation in water level has such a profound impact on new land inundated or new land exposed. The feature of the lake which is particularly unusual to this litigation is a feature which is not actually in litigation. This is to say that the actual lands in dispute have no significant inherent value, but the brines in the lake (the ownership of which is not an issue in this litigation) have a very substantial mineral value. The mineral lessees of the State of Utah cannot effectively extract minerals from the lake without building expensive extraction facilities on the lands adjacent to the lake. It is, therefore, necessary to obtain title security to the exposed lands around the lake in order to develop and extract the minerals within the lake brines. One of the peculiar facts of this case, then, is that the denial of any relief to plaintiff will not only prevent any solution to the title questions actually in issue, but will further prevent and totally frustrate mineral development of the brines. Since these brines have a value estimated to be many billions of dollars, this certainly is an equitable consideration entitled to great weight.

B. There is no other Forum Available to Determine the Present Controversy.

If Morton and the other private claimants similarly situated are determined to be indispensable parties and the case thus had to be dismissed for lack of constitutional jurisdiction, then it necessarily follows that there is and can be no other forum for litigation of the respective claims to the lands in question. This is so because the claims of the United States would not be determined or resolved, and the United States would appear to be just as indispensable to any action in the state courts of Utah as Morton would be in this action. Congress would be without power to enact new legislation to provide consent for the United States to be sued in the federal district court of Utah, for there would be no constitutional jurisdiction for a quiet title action between a state and its citizens in the federal district courts. If the present action were to be dismissed, there would thus be no state or federal court which would or could have jurisdiction over all of the indispensable parties. Neither the Utah Legislature nor the United States Congress could by legislation provide a forum. The present vexation and crippling uncertainties would persist—perhaps forever!

C. A Desire to Settle the Present Controversy Between Utah and the United States has been Demonstrated by the Legislative and Executive Branches of both Governments.

The crying need for an adjudication to settle the differences between Utah and the United States has been vividly demonstrated by the affirmative involvement of the legislative and executive branches of both

Utah and the United States governments. With respect to the legislative branch of the United States Government, Congress has specifically enacted the Great Salt Lake Lands Act to provide for the current litigation; and with respect to the legislative branch of the Utah Government, the Utah Legislature has specifically consented to the provisions of the federal act and has specifically authorized the present litigation.

The executive branch of the United States Government became directly involved when the Department of Interior reported to Congress an immediate need for the legislation to allow resolution of the title problems (Senate Hearings, *op cit, supra*, page 11), and when President Lyndon B. Johnson, prior to signing the Great Salt Lake Lands Act into law, initiated a discussion with Governor Calvin L. Rampton with respect to the provisions and impact of the bill. Similarly, the executive branch of the Utah State Government became deeply involved when, at the Congressional hearings with respect to the Great Salt Lake Lands Act, Governor Calvin L. Rampton testified to the urgent economic needs of the State which were being seriously hurt by the delay in resolving title uncertainties (Senate Hearings, *op cit, supra*, pp. 14-15), when the Utah Land Board testified to the injurious effect on mineral leasing (Senate Hearings, *op cit, supra*, pp. 45-50), when the Utah Fish and Game Department testified to the injurious impact on valuable waterfowl resources which serve waterfowl feeding and resting needs for large numbers of birds that migrate as far as from Russia to South America (Senate Hearings, *op cit, supra*, pp. 50-60), and when the

Great Salt Lake Authority testified to the injurious impact on its attempt to develop swimming, boating and other recreational facilities along the lake (Senate Hearings, *op cit, supra,* pp. 60-69). Certainly there could be few, if any, parallel examples which would match the instant case as to the injurious mineral, industrial, waterfowl, recreational and related impacts sustained by a state as a result of lack of a forum to litigate. Or, for that matter, it would be difficult to find many examples where both the state and national governments, through both legislative and executive involvement, exerted such strenuous efforts to provide a means for litigation to resolve the controversy.

D. Inclusion of Morton and the other Private Persons Would Create a Complexity Incapable of Adjudication.

The present litigation, if only Utah and the United States are involved, will be reasonably simple and will be capable of an expeditious determination. But to include the private claimants as parties would cause the case to assume such a cumbersome complexity as to make any effective adjudication totally impossible. This is so because many of the private claimants have peculiar legal positions in relation to the claims and defenses which would be asserted against them by the State of Utah but which would not be asserted by the State of Utah against the United States. These claims and defenses would include statute of limitations, laches, estoppel, boundary-line agreements, boundaries by acquiescence, res adjudicata, purchase, and others. In most instances, substantial discovery would have to be done, including the taking of numer-

ous depositions, where no one except Utah and a particular private claimant would be involved.

This is to say that in many instances the claims and defenses between the State of Utah and a single private claimant would assume the proportions of an entire lawsuit, including little in common with any of the other private claimants or with the United States. It is admitted that the position of Morton is less complex than would be the position of many other private claimants, and the issues between Morton and the State of Utah would be simpler than in many other instances between Utah and other private claimants.

But, even with Morton, the trial would not be a simple matter. To illustrate the genuineness of the present claim of complexity, the answer and counterclaim filed by Utah against Morton in Civil No. C-127-66, United States District Court for the District of Utah, is useful. In that pleading there are thirteen defenses and a counterclaim in two counts. Beyond the issues now in this action between Utah and the United States, it would appear that if Utah were required to litigate with Morton and if the same issues were here raised as were raised in the federal district court, this Court would be required to determine general estoppel, estoppel from denying title of landlord, laches, four separate defenses relating to statutes of limitation, and construction of a lease agreement between Utah and Morton. If the litigation progressed, it would certainly get more involved than that, and, as said above, Morton's position is relatively simple compared with many of the approximately 150 private claimants.

Further, if the private claimants were to be included, and if this Court were to limit the adjudication to a "quiet title" action of the land claimed by the United States—and that only—it would be but a piecemeal litigation. There would be no resolution of conflicting claims *between private owners* as to lands claimed by the United States, nor would there be any resolution of ownership in those areas where the United States does not claim title. In other words, to include the private claimants would be to add a fantastic complexity to the present litigation without accomplishing anything near "complete and final" justice, even for the parties before the Courts.

The foregoing discussion, with respect to the complexity and involvement of the litigation if the private claimants were to be included as indispensable parties, is moot in the sense that this Court would not have jurisdiction to proceed to any adjudication if private claimants were to be made parties to this action. But this illustration of complexity, as well as the earlier discussion relating to the great harm to be suffered by everyone unless some relief is afforded in this action, is simply to show particular facts which should be carefully weighed by a court of equity in determining whether the private parties should be termed indispensable.

E. Morton's Right can be Protected in its Absence.

It is true that if any of Morton's property rights were to be impaired or destroyed by this action, in the absence of Morton, then it obviously would be unconstitutional to proceed to that result. But that is not

the case here. Utah in its complaint has prayed only that the Court determine the respective interests between it and the United States. Congress has specifically said that private rights and interests shall not be affected by this action. Surely, any decree or judgment entered by this Court can and must be shaped and drafted so as to incorporate the protective legislative language and to provide specifically that any and all claims of private parties shall be preserved and shall be unaffected by the decree, and that the adjudicated rights of the State of Utah and the United States shall in no way be construed to impair or diminish the claims of private owners.

If the complaint asks nothing of Morton, if Congress says Morton's rights shall not be affected, and if the United States Supreme Court says that Morton's rights are not to be affected—then it is difficult to see how or by whom Morton's rights will be affected.

CONCLUSION

The obvious purport of Rule 19, as demonstrated by its background and content, and by the wealth of case authority discussing indispensable parties, clearly shows that the rule is designed to make final judgments and decrees as meaningful as possible. If vexatious and duplicitous litigation can be avoided, if persons and parties can be protected from double or multiple liability, if litigation can be streamlined so that the most sensible and practical utilization of the courts can be implemented to the benefit of everyone who had ought to be before the court—then the rule serves a substantial purpose.

But the rule ought not to be applied when it would have exactly the reverse impact. A well-known parallel is the application of the statute of frauds, wherein the courts uniformly refuse to apply the statute of frauds in a situation where the result would be, in effect, to work a fraud. This analogy is simply to say that if the court were to find Morton and the other private claimants to be indispensable, the result would be to deprive everyone of any meaningful adjudication, and deprive everyone of having any day in any court on the merits of the controversy.

The present case is highly unusual in a great number of respects, some of which have been set forth under Point V above. But one of the most striking features of the case is that Morton can protect its rights only if it is excluded from this litigation. While at first blush this might seem paradoxical, it is nevertheless true, because if Morton is indispensable then

there can be no litigation, there will be no other forum, and Morton will not be able to establish or adjudicate *any* rights. But, if by initial litigation in this Court between the State of Utah and the United States only, Utah can acquire the federal ownership interest, then subsequent litigation will be possible for Morton and all other private claimants to determine their respective claims against the State of Utah.

Morton is not indispensable and its motion to intervene should be denied.

Respectfully submitted,

PHIL L. HANSEN
Attorney General
State of Utah

Attorney for Plaintiff

236 State Capitol
Salt Lake City, Utah 84114

CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that five (5) copies each of the foregoing Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530, Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D.C. 20006, by mailing the same, air mail postage prepaid, to their respective offices, this 24th day of January, 1968, all in accordance with the Rules of this Court.

PHIL L. HANSEN

Attorney General
State of Utah

Counsel for State of Utah

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SUPREME COURT, U. S.

No. 33, ORIGINAL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

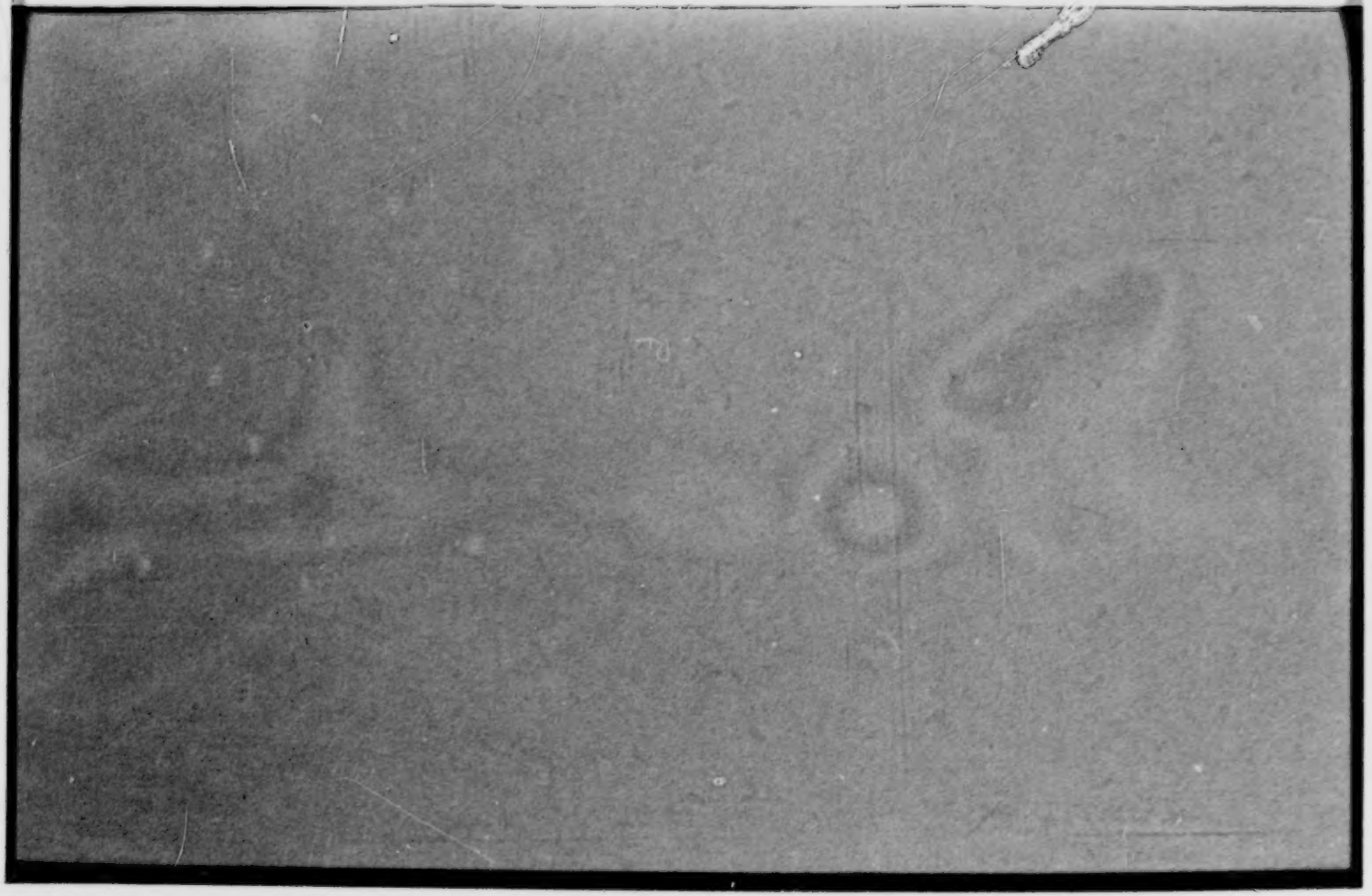
v.

UNITED STATES OF AMERICA, *Defendant*.

MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION TO INTERVENE AS A PLAINTIFF, AND ITS COMPLAINT

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006
Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION TO INTERVENE AS A PLAINTIFF, AND ITS COMPLAINT

GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION, a Delaware corporation (hereinafter referred to as "GSL"), by its attorneys, respectfully moves the Court for an order granting it leave to intervene as a plaintiff pursuant to Rule 24(a), as amended in 1966, or, in the alternative, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, in order to assert the claims set forth in its proposed Complaint, *infra*, p. 13. The grounds for this motion and the arguments in support thereof are set forth below.

STATEMENT OF FACTS

This litigation represents the culmination of an existing dispute between the United States (hereinafter called "U. S.") and the State of Utah (hereinafter called "State") regarding the paramount right, as between them, to the exposed lands surrounding the Great Salt Lake (hereinafter called "Lake").

Any commercial development of these lands necessarily entails a substantial financial investment by those private interests concerned with such an undertaking. Uncertainty as to the title in these lands presents a barrier to their development. Obviously, private interests cannot reasonably be expected to invest the substantial sums required, or to obtain necessary financing therefor, if any doubt exists as to their legal interest in the land on which any industrial complex is to be located.

The dispute between the U. S. and the State first arose in 1959 as a consequence of a recognition that commercial development by private parties of these lands was possible and imminent.[1] The U.S. and the State were unable to resolve the dispute administratively. Consequently, resort was had to the enactment of federal legislation which would have quitclaimed to the State the rights of the U.S., if any, in the lands in question. Various bills were introduced beginning with the 87th Congress which would have effected this. For reasons unnecessary for the purposes of this motion, no such legislation was enacted.

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[1] Prior to this time the U. S. had not asserted title to these lands. In fact, the U. S. concedes that it purchased from, and paid the State for, part of the lands here in controversy. Answer of the U. S. herein, part IV.

After further extensive hearings and thorough consideration by the Congress, the 89th Congress enacted P.L. 89-441, 80 Stat. 192, on June 3, 1966.[2] It provided that the State would have the option either to purchase the exposed lands surrounding the Lake at a value to be determined by the Secretary of the Interior or to institute an action in this Court to resolve finally whether or not the U.S. or the State had the paramount right to these lands.[3]

The source of any right to the lands in dispute is the U.S. The State, however, asserts that by reason of its admission to statehood in 1896, it acquired all of the rights of the U.S. in the lands which are now the basis of this controversy. Essentially the single question before this Court is to settle, as between the U.S. and the State, their respective rights to the lands. This is the question that the Congress determined should be decided by this Court.

At the time it provided for the resolution of the dispute between the U.S. and the State, the Congress was no less concerned with eliminating the barriers facing private

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[2] In accordance with P. L. 89-441 the State, by act of its Legislature, assented to the terms of the Federal Act on June 6, 1966. Ch. 11, at 20, Utah Laws 1966 (2d Special Session). "The purpose" of the State legislation, as stated in the Act itself, was "to provide interim administration of exposed lands lying below the surveyed meander line of the great salt lake while differences as to *whether the United States or the state of Utah owns such lands* are being settled in accordance with" P. L. 89-441. (Emphasis Supplied.) P. L. 89-441 was thereafter amended by P.L. 89-542, 80 Stat. 549. See discussion p. 7, *infra*.

[3] In the event that it is determined in such litigation that the U. S. has the paramount right to the lands in controversy, the State will then have the option to purchase the lands at their fair market value as of the date of the termination of the litigation. P. L. 89-441, § 5.

interests who might develop the lands bordering the Lake. Indeed, it was those interests which were foremost in the deliberations of the Congress. The legislation was, therefore, designed to afford immediate and lasting protection to parties interested in developing the Lake's resources. For example, Senate Report No. 1292, 89th Cong., 2d Sess., accompanying the legislation amending P.L. 89-441, notes that the Senate Committee on Interior and Insular Affairs had rejected an amendment proposed by the Department of Interior which would have required renegotiation of *all* of the terms of all "permits, licenses and leases" issued by the State. In so doing, the Committee Report stated at p. 3:

> "Under such conditions, banks would be reluctant to advance money for development of the mineral resources of the brines of the lake, and thus a *primary purpose of the parent law would fall.*" (Emphasis supplied.)

There is no existing forum other than this Court in which the controversy between the U.S. and the State can be resolved. The matters before this Court are of the utmost importance and concern to all parties. In the exercise of its original jurisdiction, it is, we submit, the function of this Court to mould its proceedings in a manner which will best attain the ends of justice and achieve the ultimate goal as intended by the Congress.[4]

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[4] Without doubt, in cases of original jurisdiction it is one of the Court's "first objects to disengage . . . [itself] from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice . . . [can] be attained." *Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 491 (1854).

I. GSL HAS THE RIGHT TO INTERVENE IN THIS PROCEEDING

Rule 9 of the newly adopted Rules of Procedure of this Court provides:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24(a) of the Federal Rules of Civil Procedure provides:

> "Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Pursuant to Rule 24(a), GSL, we submit, has the right to intervene in this proceeding.

A. GSL HAS A SUBSTANTIAL INTEREST IN THE CONTROVERSY

GSL holds certain leasehold interests (acquired in substantial part prior to enactment of P.L. 89-441) and an option to lease (granted prior to enactment of P.L. 89-441)

embracing a significant part of the land in controversy.[5] Also, GSL has a royalty agreement with the State which grants to GSL the right to extract minerals from the waters of the Lake. The leases — which contain no after-acquired title clause, royalty agreement and option (hereinafter collectively called "Interests") were issued by the State to GSL or its predecessors in interest without warranting title or assuming any obligation to protect the Interests. The lands embraced by GSL's leases and option are delineated on the plat denominated Exhibit 1 in the Appendix, *infra*.

GSL obtained its Interests for the express purpose of developing an industrial complex to extract minerals from the brines of the Lake through solar evaporation. In the belief that it acquired from the State valid leasehold interests to the land in controversy and in reliance upon the protection afforded it by the enactment of P.L. 89-441 and the accompanying State legislation, GSL has expended approximately ELEVEN MILILON DOLLARS ($11,000,000.00) in developing its leaseholds. In order to complete its operational facilities, GSL is committed to additional expenditures of approximately FOURTEEN MILLION DOLLARS ($14,000,000.00). By its expenditures and its commitment for the future, GSL believes that it has the largest single private investment in the lands in controversy

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[5] In addition, GSL owns fee title to property adjacent to and upland of the land in controversy. In this respect, GSL's interests are substantially the same as those asserted by Morton International, Inc. as the legal basis of its right to intervene in this proceeding. GSL also has options to purchase the rights, if any, to the lands in controversy held by other similarly situated fee owners.

B. GSL'S INTERVENTION IS NECESSARY TO PROTECT ITS SUBSTANTIAL INTERESTS

The substantial legal and equitable interests of GSL in the lands in controversy are interests which the Congress clearly intended to protect in the enactment of legislation to resolve the controversy between the U. S. and the State. Yet, if it is determined that the U. S. has paramount rights to the lands in controversy, there is a serious threat that GSL will lose its entire investment or that its ability to operate profitably will be jeopardized. It is understood that the U. S. through its Solicitor of Interior maintains that GSL's leases and option issued prior to the enactment of P.L. 89-441 are not among the interests protected by Section 6 of that legislation, as consented to by the State Legislature.[6] The full extent and nature of GSL's interests can be brought before this Court only if GSL is permitted to intervene in this proceeding.

On August 23, 1966, P.L. 89-542 was enacted. It amended P.L. 89-441 so as to provide that the land rental terms of leases issued by the State would be subject to review and modification "not less frequently than every five years by the Secretary of the Interior." The review and modification provisions of the amendment permit the

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[6] See letter of Frank J. Barry, Solicitor of the Department of the Interior, reprinted in House Report 1685, 89th Cong., 2d Sess. at 5; Senate Report 1292, 89th Cong., 2d Sess. at 4 (1966). Also see Ch. 11, § 6, Utah Laws 1966, at 21 (2d Special Session).

Secretary of the Interior to change substantially the terms of the existing leases from the State to GSL.[7]

It, therefore, should be apparent from the foregoing that if the U. S. were to prevail in this litigation, GSL has substantial interests which would be materially affected. Its intervention is necessary in order that this Court will have before it the full nature and extent of such interests in order that its equitable disposition of these proceedings will afford GSL the protection intended by the Congress.

These are interests in the lands in controversy which would not necessarily be considered by the Court under the present pleadings. GSL's ability to protect these interests could be substantially impaired if it were not permitted to intervene at this time and were left to attempt to enforce its rights after the basic controversy between the U.S. and the State was resolved.

C. GSL'S INTERESTS ARE NOT ADEQUATELY REPRESENTED BY EXISTING PARTIES

Clearly, the U.S. does not represent GSL's interests in this proceeding inasmuch as the U.S. claims land which GSL occupies under leases issued to it under an assumed paramount right of the State. As noted previously, the U.S. apparently contends that despite the enactment of P.L.

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[7] The leases issued by the State to GSL provide generally for a 49-year term, commencing September 1, 1962, and May 1, 1963, respectively, at a fixed rental of $.50 per acre. Rental rates may be adjusted at the end of 25 years, and royalty payments under a separate royalty agreement with the State are to be credited against rentals.

89-441, these leases, as presently issued, are not binding upon it. Nor does GSL believe that the State can or will sufficiently represent GSL's interests since the State's interests may be divergent from those asserted by GSL. Indeed, the State is in a position to compromise and settle the litigation in a manner detrimental to GSL. The State did not warrant title at the time it issued the leases to GSL. It thus is under no obligation to insure that the existing leases are honored.

A further consideration is the fact that GSL's leases contain no after-acquired title clause. If the U.S. were to prevail, the State has the option to acquire the land in controversy by paying the fair market value for it as provided in P.L. 89-441. The State would thus be in the position to contend that the leases previously issued to GSL are void and to argue that GSL should be required to renegotiate the terms and conditions of them.

P.L. 89-441 further provides that "any valid permits, licenses, and leases issued by the State" during its trusteeship of the lands in controversy pending resolution of the controversy would be deemed "permits, licenses, and leases of the United States." P.L. 89-441, Section 6. At the time of the enactment of P.L. 89-441, GSL was the holder of an option to lease from the State certain portions of the land in controversy. On June 21, 1966, GSL exercised its option which, by its terms, required the State to issue a lease "promptly." The State has refused to issue a lease effective as of the date of the exercise of the option and before the enactment of the amendment to P.L. 89-441.

Moreover, even though the Utah State Legislature has never consented to the amendment to P.L. 89-441, the agency of the State administering the public lands of the State has adopted the renegotiation requirements provided for by that amendment in the issuance or reissuance of any leases during the State's trusteeship of the lands in controversy. In doing so, it has — at least implicity — acknowledged that if the U.S. should prevail, GSL's leases could be validated and confirmed only under terms which would subject them to the renegotiation requirements of the amendment to P.L. 89-441, as amended.

It thus should be apparent that the interests of GSL in this controversy are not adequately represented by existing parties and that GSL has the right to intervene in this proceeding under Rule 24(a) of the Federal Rules of Civil Procedure.[8]

II. ALTERNATIVELY, GSL SHOULD BE PERMITTED TO INTERVENE UNDER RULE 24(b)

Rule 24(b) of the Federal Rules of Civil Procedure provides:

> "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

---

[8] See *Atlantis Development Corp.* v. *United States*, 379 F.2d 818 (5th Cir. 1967); *International Mortgage & Investment Corp.* v. *Von Clemm*, 301 F.2d 857 (2d Cir. 1962); *Kozak* v. *Wells*, 278 F.2d 104 (8th Cir. 1960).

GSL's interests necessarily involve questions of law or fact common to those already raised by the original parties. GSL's participation in the suit would not unduly delay or prejudice the adjudication of the issues before this Court. GSL is in a position to contribute materially to the Court's understanding of the private interests which the Congress intended to protect by enacting P.L. 89-441 and which would be affected by the outcome of the instant litigation. If GSL is not allowed to intervene, it has no other remedy against the U.S. at the present time, and may well have no remedy at the conclusion of this proceeding. There are thus good reasons why, in the exercise of its equitable power, this Court should permit GSL to intervene.

CONCLUSION

GSL has demonstrated that it has a substantial interest in the subject matter of this proceeding. GSL's interests, which the Congress intended to protect, may be seriously prejudiced by the disposition of this proceeding. It has been further shown that GSL's ability to protect its interests may be impaired as a result of this litigation. Its interest in the matter is so divergent from that of each of the existing parties that neither represents GSL's interest adequately. Accordingly, GSL has a *right* to intervene in this proceeding under Rule 24(a).

Alternatively, we submit that this Court should, in its discretion, *permit* GSL to intervene under Rule 24(b) inasmuch as GSL's rights involve questions of law or fact common to the main action and its presence would not unduly delay or prejudice the adjudication of the rights of the original parties.

Therefore, we respectfully requeset that GSL be allowed to intervene in this proceeding.

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

January 24, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

COMPLAINT OF PLAINTIFF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

Plaintiff GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION (hereinafter referred to as "GSL"), a Delaware corporation, by its attorneys, for its claim against the Defendant United States alleges as follows:

I

This Action is brought under and jurisdiction is conferred upon this Court, by Article III, Section 2, United States Constitution, and P.L. 89-441, 80 Stat. 192, as amended, P.L. 89-542, 80 Stat. 349 (1966), which statutes also give the consent of the United States to this Action.

II

The subject of this Action is certain land (hereinafter called the "Land") around the Great Salt Lake (hereinafter called the "Lake"), title to which is disputed between the United States of America (hereinafter referred to as "U.S.") and the State of Utah, more particularly described in the Complaint of the State of Utah on file herein.

III

GSL holds in fee certain real property adjacent to and upland of the Land. GSL also holds certain leasehold interests, an option to lease, and a royalty agreement from the State of Utah, which interests collectively give GSL the right to extract minerals from the Lake. GSL's leases and option embrace a substantial portion of the Land, as marked on the plat attached hereto as Exhibit 1 of the Appendix and hereby incorporated by reference.

IV

GSL acquired its leaseholds and option from the State of Utah for the purpose of developing facilities to extract minerals from the brines of the Lake. It has already expended approximately ELEVEN MILLION DOLLARS ($11,000,000.00) in developing such facilities and is committing an additional FOURTEEN MILLION DOLLARS ($14,000,000.00) in order to complete the extraction complex.

V

The operation and continued development of GSL's extraction complex depends entirely on GSL having the right to use and possess the lands embraced in its leasehold and option.

VI

Since approximately 1959, Defendant United States has wrongfully and unlawfully been asserting a claim to the lands embraced in GSL's said leaseholds and option.

VII

Defendant United States wrongfully and unlawfully threatens to deprive GSL of the protection of its legal interests conferred upon it by the enactment by the Congress of P.L. 89-441.

VIII

The wrongful and unlawful claims of the United States to the Land has clouded the title to GSL's leasehold and option interests and threatens to cause the loss to GSL of its substantial investment and its legal and equitable right under said interests, all to Plaintiff GSL's great, continuing and irreparable damage.

IX

Plaintiff GSL has no adequate remedy at law.

WHEREFORE, Plaintiff GSL prays the Court to:

1. Declare that GSL has, as against the U.S., the right to use and possess the portion of the Land embraced in GSL's leaseholds and option under their existing terms and conditions;

2. To enjoin Defendant U.S., its officers, servants, agents and attorneys from asserting any claim to said portion of the Land or otherwise interfering with or disturbing GSL's quiet and peaceful enjoyment thereof;

3. To grant Plaintiff GSL such other relief as the Court finds right, just and equitable in the premises.

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

January 24, 1968

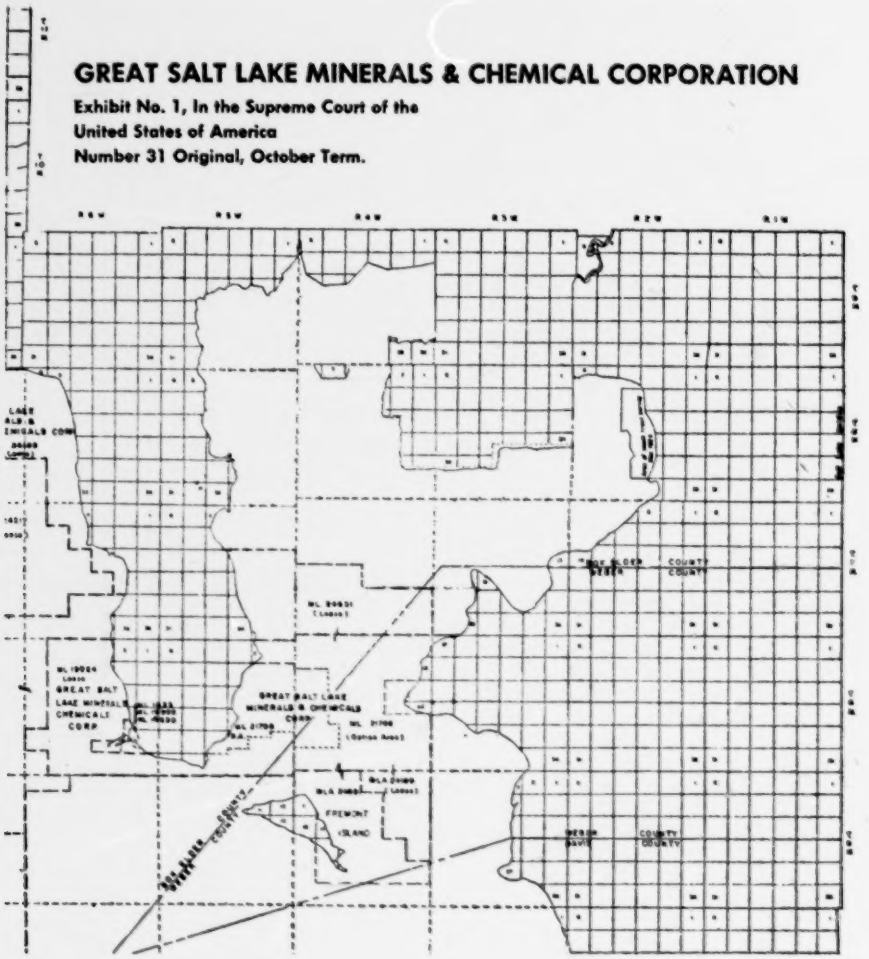
CERTIFICATE OF SERVICE

I, GEORGE E. BOSS, Counsel for Great Salt Lake Minerals & Chemicals Corporation, applicant for Intervention herein, and a member of the Bar of this Court, hereby certify, in accordance with Rule 33 of the Rules of this Court that five (5) copies of the foregoing Motion and Complaint were served by mail upon the Solicitor General of the United States of America, Department of Justice, Washington 25, D.C., Counsel for Defendant United States of America; L. M. McBride and Frank Wollaeger, of McBride, Baker, Wienke & Schlosser, 110 North Wacker Drive, Chicago, Illinois 60606, and Myer Feldman and Martin Jacobs, 1700 Pennsylvania Ave., N.W., Washington, D.C. 20006, Counsel for Morton International, Inc.; and the Attorney General of the State of Utah, State Capitol Building, Salt Lake City, Utah, Counsel for the State of Utah, this 24th day of January, 1968.

GEORGE E. BOSS

January 24, 1968

APPENDIX


GREAT SALT LAKE MINERALS & CHEMICAL CORPORATION
Exhibit No. 1, In the Supreme Court of the
United States of America
Number 31 Original, October Term.
R6W
R5W
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R1W
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GREAT SALT LAKE MINERALS & CHEMICALS CORP.
FREMONT ISLAND
COUNTY
COUNTY

PREME COURT, U. S.
FEB 5 1968
JOHN F. DAVIS, CLERK

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

REPLY BRIEF OF MORTON INTERNATIONAL, INC. TO BRIEF OF STATE OF UTAH IN OPPOSITION TO MOTION OF MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE

L. M. MCBRIDE
FRANK A. WOLLAEGER
110 North Wacker Drive
Chicago, Illinois 60606

MYER FELDMAN
MARTIN JACOBS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

MCBRIDE, BAKER, WIENKE & SCHLOSSER
GINSBURG AND FELDMAN
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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No. 31, ORIGINAL

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STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

REPLY BRIEF OF MORTON INTERNATIONAL, INC. TO BRIEF OF STATE OF UTAH IN OPPOSITION TO MOTION OF MORTON INTERNATIONAL, INC. FOR LEAVE TO INTERVENE

This brief is submitted by MORTON INTERNATIONAL, INC. (hereinafter referred to as "Morton") in reply to the brief filed by the State of Utah in opposition to Morton's motion for leave to intervene and answer. Since the brief filed by the United States supports Morton's position and urges the Court to grant Morton's motion, this brief, in addition to the reply to Utah, contains merely a short comment with respect to the argument on jurisdiction set forth in Part II of the United States' brief.

ARGUMENT

I. MORTON IS INDISPENSABLE UNDER THE CRITERIA ESTABLISHED BY THE COURT AND UTAH'S "PRACTICAL CONSIDERATIONS" ARE IRRELEVANT

Most of Utah's brief is devoted to an attempt to show various dire results which the granting of Morton's motion would cause. All of this is irrelevant to the question of

Morton's indispensability. These irrelevancies have evidently been inserted to persuade the Court to disregard Morton's position, regardless of its soundness, for "practical considerations."[1] This approach is understandable only when, after even a cursory reading of the brief, it is apparent that Utah has been unable to cite a single case contrary to the controlling decisions of this Court upon which Morton relies in support of its motion.

The rules established by the Court in *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), for determining the indispensability of an absent person have been adhered to and applied by this Court and lower courts without dilution to the present day.[2] When Utah states in its brief that "each case must be judged in the light of its particular facts," it is merely stating the obvious. Utah is plainly incorrect, however, when it argues that, after the Court has considered the facts, there exists no formula or criteria to be applied to determine indispensability. The whole purpose of analyzing the facts is to see whether they fall within the criteria set forth in *Shields* v. *Barrow*, *supra*, for indispensability, *i.e.* (58 U.S. at 139):

"Persons who not only have an interest in the contro-

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[1] *E.g.*, the nature of the litigation is highly unusual; Morton's joinder would add "cumbersome complexity" to the case; there is no other forum available to determine the controversy if the case is dismissed for lack of jurisdiction; the legislative and executive branches of both Governments desire to settle the controversy without private parties.

[2] *Barney* v. *Baltimore*, 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead*, 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean*, 97 U.S. 423 (1878); *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Washington* v. *United States*, 87 F. 2d 421 (9th Cir. 1936); *McShan* v. *Sherrill*, 283 F. 2d 462 (9th Cir. 1960); *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

> versy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The facts in this case bearing on Morton's indispensability are set forth in Morton's motion and show that a substantial portion of the lands, title to which is in dispute in this litigation, is claimed by Utah (on the theory that it owns the bed of the Lake of which these lands are allegedly a part), by the United States (under the common law doctrine of reliction and the Basart Doctrine), and by Morton (under the common law doctrine of reliction and by reason of its claim of non-navigability of the Lake). In this situation the present parties are seeking an adjudication of Morton's interest as well as their own. These are the only facts to be considered in determining Morton's indispensability, and they are not disputed by Utah.

In the light of these particular facts it is clear that the cases cited by Utah actually support Morton's position. In *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152 (1825), plaintiff brought a bill in equity to obtain a conveyance of lands. With respect to the lands in question plaintiff was a tenant in common with a person not joined as a party. The Court held that their respective rights as tenants in common were each independent of the other and that, therefore, the matter could be adjudicated between the plaintiff and defendant without injuring the absent party. *Elmendorf* was distinguished and limited to its facts by the Court in *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193 (1827), which stated (25 U.S. at 198):

> "In this case [*Mallow* v. *Hinde*], the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those

> not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties."

Payne v. *Hook,* 74 U.S. (7 Wall.) 425 (1869), involved an action by the plaintiff to compel the defendant, as administrator of her brother's estate, to account and pay over to the plaintiff her rightful share of the estate. Other distributees of the estate, not before the court, were citizens of Missouri and if joined as plaintiffs would have ousted the trial court of its diversity jurisdiction since the defendant was also a citizen of Missouri. The Court held that these distributees were not indispensable since they were each entitled to a portion of the estate, but in no instance the same portion; therefore, their interests were severable and not overlapping or conflicting.

Obviously, *Elmendorf* and *Payne* lend no support to Utah's position since the absent parties were, what are now classified as, necessary parties having interests in the subject matter, but whose interests would not be adversely affected by a decree. Each of the other cases cited by Utah in which the court has not required joinder of interested absent persons involved necessary parties rather than indispensable parties.[3] A court has discretionary power not

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[3] *Texas Co.* v. *Wall,* 107 F.2d 45 (7th Cir. 1939). In an action by an oil and gas lessee to enjoin the entry of third parties, the lessor was not an indispensable party as the validity of his title would not be affected.

Lubin v. *Chicago Title and Trust Co.,* 260 F.2d 411 (7th Cir. 1958). An action by beneficiaries to surcharge the trustee with loss of trust income, or in the alternative, for damages. The court held that the settlor and the executrix of the estate of the settlor were

(continued on next page)

to require the joinder of a necessary party if such joinder is not feasible or would deprive the court of jurisdiction. *Mallow* v. *Hinde, supra; Shields* v. *Barrow, supra.*

Utah's attempt to distinguish this case from *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895), is patently fruitless. That was an action to quiet title in the State of California to lands as against the claims of the Southern Pacific Co. In that case, as in this litigation, a decree could not bind absent persons. As Utah correctly points out, to de-

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(continued from preceding page)

not indispensable parties although they had an interest in the subject matter of the litigation because a decree could be entered that would do justice to the beneficiaries and the trustee without affecting the rights of the settlor or the executrix.

Union Mill & Mining Co. v. *Dangberg*, 81 F. 73 (C.C.D. Nev. 1897). An action by one tenant in common to restrain the infringement of his water rights. The court held that the other tenant in common was not an indispensable party as the tenants' interests were several there merely being a unity of possession.

Humble Oil and Refining Co. v. *Sun Oil Co.*, 190 F.2d 191 (5th Cir. 1951). An action by Sun Oil Co. to establish title and recover possession of certain leasehold estates as well as to quiet title and enjoin the defendants from interfering with Sun's use of the property. On appeal, the court stated that error was committed in allowing the State of Texas, as the common lessor, to intervene as it would introduce a new litigant who was not an indispensable party since its title was not affected and whose presence would destroy the court's diversity jurisdiction.

McArthur v. *Rosenbaum Co. of Pittsburgh*, 180 F.2d 617 (3rd Cir. 1950). An action by certain lessors for a declaratory judgment construing a lease. The court held that other lessors of another tract on which the building was located were not indispensable parties for the title to their property would not be affected by any decision in the case, their lease and the option in it would not be affected, nor would it be inequitable to proceed without their presence.

termine the rights of the Southern Pacific Co., it would have been necessary to adjudicate directly upon the rights of the City of Oakland, an absent person, since the Southern Pacific Co. derived its claim of title through Oakland, which still claimed ownership interests. Similarly in this case, to determine the rights of the United States, it will be necessary to adjudicate directly upon the rights of Morton, since Morton derives its claim of title through the United States, which still claims ownership interests in the lands claimed by Morton. As a matter of fact and law, the *California* case is indistinguishable from this case on the question of indispensability. See, also, *McShan* v. *Sherrill*, 283 F.2d 462 (9th Cir. 1960).

Assuming, *arguendo*, that for one reason or another the requirement of Morton's joinder as a party would prevent the litigation from proceeding, as is suggested by Utah, such a result has no bearing on whether or not Morton is an indispensable party.[4] In urging the Court to adopt a "practical" or "pragmatic" approach, Utah quotes at length from Professor Reed's article, "Compulsory Joinder of Parties in Civil Actions," 55 Mich. Law Rev. 327 (1957). However, except for a few ambiguous statements, Professor Reed merely urges that the courts appraise the facts carefully and pragmatically in determining whether the criteria of indispensability apply to the absent party. One factor in such determination is whether an effective decree can be framed between the parties without affecting the absent party's interest. If such is the case, and the other criteria of indispensability are not present, the absent person is merely a necessary party and not indispensable. Then the court, in its discretion, may dispense with his joinder if it

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[4] It is Morton's position, as set forth in Parts II and III of this brief, that its required joinder would have no such effect.

would oust the court from jurisdiction. This is the manner in which most courts have approached the problem in any event, and Morton certainly has no quarrel with this proposition.[5]

When, however, after an analysis of the facts, the court has determined that the absent person is indispensable, it is mandatory that he either must be joined or the action must be dismissed regardless of the consequences to the parties. It is not a matter within the court's discretion. Thus the "practical facts" which Utah urges the Court to consider in denying Morton's motion have been uniformly and specifically rejected by this Court and lower courts. In *Shields* v. *Barrow, supra,* the Court states (58 U.S. at 146):

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[5] As is stated in 3A *Moore's Federal Practice,* para. 19.05[1] at p. 2206:

> "The criteria of revised subdivisions (a) and (b) [Federal Rules of Civil Procedure, Rule 19] follow the criteria laid down by the Supreme Court in *Shields* v. *Barrow* and numerous other cases decided by the Supreme Court and the lower courts. "Since the Committee did not single out any line of cases nor even a single case that the revised rule was intended to overrule, revised subdivisions (a) and (b) should be read, like their antecedents were read, as substantially continuing the judicial tradition dealing with compulsory joinder that goes back to 1789. This does not mean that after evaluating the facts of a case a court may not decide the matter of joinder differently than a like case had decided it prior to 1966. But this is nothing novel. Courts were continually reappraising and differentiating earlier cases, prior to the revision of 1966; and this judicial process will continue, subject, of course, to a proper respect for stare decisis. What should be borne in mind is that the revised Rule 19 does not break with the past; and, in general, who are necessary and who are indispensable parties are those who were so classified prior to the revision of Rule 19." [Footnotes omitted]

> "This court regrets that a litigation, which has now lasted upwards of thirteen years, should have proved wholly fruitless; but it is under the necessity of reversing the decree of the Circuit Court, ordering the cause to be remanded, and the original and cross-bills dismissed."

Similarly, in *Franz* v. *Buder*, 11 F.2d 854 (8th Cir. 1926), *cert. denied*, 273 U.S. 756 (1927), the court states (11 F.2d at 857):

> "Counsel for plaintiff say to hold that such persons were indispensable parties will leave him wholly without a remedy in the premises, for the reason that they are not residents either of the State of Missouri or the State of Kansas where plaintiff resides. Such a result would not excuse the failure to join an indispensable party. . . ."

Certainly, if any such practical considerations had a bearing on indispensability, this Court would not have ignored them in *California* v. *Southern Pacific Co.*, *supra*, when it dismissed the complaint after lengthy proceedings on the merits in which the "absent" parties actually participated as *amici curiae*.

The justification for the equitable principles developed by this Court, which manditorily require the joinder of a person whose interest is inextricably bound up in the claims of the parties and will be directly affected by an adjudication, is perfectly illustrated in this case. A ruling in favor of either Utah or the United States with respect to the lands also claimed by Morton would necessarily involve a ruling on the validity of Morton's claim to title. Unless permitted to intervene, Morton will be unable to defend the validity of its claim. This is exactly the situation that the doctrine of indispensability is designed to prevent.

II. NEITHER THE GREAT SALT LAKE LANDS ACT NOR THE DOCTRINE OF SOVEREIGN IMMUNITY IS A BAR TO MORTON'S INTERVENTION

Utah devotes many pages of its brief in an attempt to develop its remarkable theory that, since Section 2 of the Great Salt Lake Lands Act[6] provides ". . . that the provisions of this Act will not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation or other non-governmental entity, in or to any of the lands within and below said meander line," the litigation authorized by the Act does not affect Morton's interest. Therefore, Utah argues, the Act bars Morton's intervention as a party in this litigation. Actually, the converse is true.

The above-quoted proviso in Section 2 merely states explicitly what Congress could not constitutionally do in any event. Congress cannot merely by legislative action impair a person's property rights since this would be a deprivation of property "without due process of law" prohibited by the 5th Amendment. *Union Pacific Railroad Co.* v. *United States,* 99 U.S. 700 (1879). Furthermore, if the Act could be construed to deny a person the right to defend the validity of his title through intervention, then the Act's constitutionality would be highly doubtful. Such a construction would be improper.

There is no ambiguity in the Act which justifies resort to legislative history. *Ex parte Collett,* 337 U.S. 55 (1949). Accordingly, the voluminous quotations in Utah's brief from published Congressional hearings held prior to the passage of the Act serve no valid purpose. This litigation was authorized under the Act "to secure judicial determi-

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[6] Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349.

nation of the right, title and interest of the United States" in the land in dispute. Since part of the land in dispute is claimed by private parties, which claims both Utah and the United States assert are invalid, such persons must of necessity be permitted to intervene or their interests and rights *will* be affected, contrary to Section 2 of the Act. The Act, therefore, clearly requires that Morton's motion to intervene be granted.

The United States has, understandably, not asserted sovereign immunity as a bar to Morton's intervention, since it is clear that this doctrine is not applicable. Sovereign immunity does not preclude the intervention of a person in litigation to defend his interest in the subject matter against the claim of a sovereign. In *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), numerous parties claiming interests in the subject matter were permitted by this Court to intervene in a dispute between Oklahoma, Texas and the United States involving ownership of the bed of the Red River. There was no statutory consent to these interventions. The rationale for permitting the intervention of dispensable parties without statutory consent was succinctly stated by the Ninth Circuit in *California* v. *United States*, 180 F.2d 596 (9th Cir. 1950), with respect to California's motion to intervene (180 F.2d at 602):

> "The Government also makes the contention that this is a suit against the Government and, there being no statute authorizing it, the Court does not have jurisdiction. The short answer to that is that the Government chose the forum in which it is seeking to quiet title to the water. The State is asserting an interest in the subject matter as absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. This is a sufficient interest in the subject matter to entitle it to be heard, just as if the State were joined by the United States originally as a defendant."

See, also, *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936).[7] The doctrine of sovereign immunity, when applicable, applies to a state, as well as a private party, in an action against the United States. *Arizona* v. *California*, 298 U.S. 558 (1936).

Even if the foregoing were not the law, Utah has, nevertheless, consented to any adverse claim by Morton in this action by reason of Section 78-11-9, Utah Code Annotated, not mentioned in Utah's brief, which statute provides:

> "Upon the conditions herein prescribed the consent of the State of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought *in any court of this state or of the United States* for the recovery of any property real or personal or for the possession thereof *or to quiet title thereto*, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. It shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof." (Emphasis added)

Similarly, the United States has consented to an adverse

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[7] In this case the court, reversing the decree, directed the trial court to permit the intervention of the States of Washington and Oregon on the ground that the order denying intervention deprived these states of any effective remedy for the adjudication of title because the United States had not consented to a subsequent suit against it.

claim against it by Morton under Section 5(b) of the Great Salt Lake Lands Act, which provides in pertinent part:

> ". . . may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as *a* defendant to such an action is hereby given." (Emphasis added)

Clearly, the use of the term "a defendant" rather than "the defendant" encompasses the joinder of other parties defendant.

III. THE JOINDER OF CITIZENS OF UTAH AS PARTIES DEFENDANT WOULD NOT DIVEST THE SUPREME COURT OF ITS JURISDICTION OVER THE CASE

No citizen of Utah, similarly situated to Morton, has sought to intervene in this case. In anticipation, however, that there may be citizens of Utah who must be joined as indispensable parties, Utah argues that their joinder will deprive the Court of its jurisdiction on the basis of the decision in *California* v. *Southern Pacific Co., supra.* Morton disagrees with this position and concurs in the position taken by the United States in Part II of its brief for the reasons stated therein.[8]

---

[8] Since we agree with the United States that the *California* v. *Southern Pacific Co.* case is distinguishable, we have not argued an alternative approach to the alleged jurisdictional problem in this brief. We note, however, that the Court in *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), resolved any possible jurisdictional problem by taking possession of the disputed lands and appointing a receiver therefor.

CONCLUSION

For the reasons set forth in this brief and in its motion, Morton is an indispensable party and its motion to intervene should be granted.

Respectfully submitted,

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsberg and Feldman
Of Counsel

February, 1968

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Reply Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah; and George E. Boss, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by mailing the same to their respective offices, in accordance with Rule 33 of the Rules of this Court this 2nd day of February, 1968.

Frank A. Wollaeger
Counsel for Morton International, Inc.

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SUPREME COURT, U. S.

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant.*

SUPPLEMENTAL MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION TO INTERVENE, IN THE ALTERNATIVE, AS A DEFENDANT, AND ITS ANSWER AND CROSS CLAIM

GEORGE E. Boss
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*.

SUPPLEMENTAL MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION TO INTERVENE, IN THE ALTERNATIVE, AS A DEFENDANT, AND ITS ANSWER AND CROSS CLAIM

As a supplement to its Motion to Intervene as a Plaintiff, previously filed herein, GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION (hereinafter called "GSL"), a Delaware corporation, by its attorneys, moves the Court, as an alternative to its said Motion to Intervene as a Plaintiff, for an order granting it leave to intervene as a Defendant in order to assert its defenses and claims set forth in its proposed answer and cross claim, *infra*, p. 11.

STATEMENT OF FACTS

The need for and purpose of the instant action is explained in some detail in GSL's Statement of Facts contained in its Motion to Intervene as Plaintiff, previously filed herein. Those facts will not be restated in this motion. Suffice it to say the dispute between the United States (hereinafter called "U.S.") and the State of Utah (hereinafter called "State") necessitated action by the Congress and the State Legislature to resolve once and for all the status of the title of the respective sovereigns to certain lands, which are the subject of the instant controversy, surrounding the Great Salt Lake (hereinafter called "Lake"). Also, it has become apparent that private parties in addition to the two named sovereigns are claiming interests in the subject lands which could be adversely affected by the outcome of this litigation.

The Congress took the initiative in settling the dispute by enacting P.L. 89-441.[1] In essence, the Congress attempted to do three things. First, it attempted to protect the rights which any private parties might conceivably have in the lands in controversy by expressly providing that nothing in the Act was to be construed to affect those rights.[2] Second, the Act established a plan whereby the State could initially decide to either purchase the U. S. interest or bring a suit in this Court to determine the paramount title

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[1] 80 Stat. 192 (1966).

[2] Section 2 of P. L. 89-441 provides:

That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below [the surveyed meander line of the lake] . . . .

as between the two sovereigns. Should the decision go against the State, it would then once more have an opportunity to purchase the U. S. interest.[3] Third, in order that the development of the Lake's resources could proceed unhindered pending final resolution of the dispute, the State was to be empowered, as a trustee during the interim, to administer the land and issue leases which would be binding on the sovereign ultimately assuming ownership of the lands in controversy.[4]

It was further provided in P.L. 89-441 that its terms and conditions would become effective only upon an express act by the State Legislature assenting thereto. The State enacted such legislation in which it agreed to act as trustee and authorized the instant action to be brought. In the same act the State Legislature "ratified and confirmed as of their date of issuance" existing leases of the State embracing portions of the land in controversy.[5]

---

[3] P. L. 89-441, § 5, 80 Stat. 192 (1966).

[4] Section 6 of P. L. 89-441 provides that if the United States ultimately assumes ownership of the lands in controversy, then

> any valid permits, licenses, and leases issued by the State under authority of this section, shall be deemed permits, licenses, and leases of the United States and shall be administered by the Secretary in accordance with the terms and provisions thereof.

This section was amended by P.L. 89-542, 80 Stat. 549 (1966) to add the following language at the end of the section:

> excepting for land rental rates which rates shall be subject to change based upon fair rental value as determined by the Secretary of the Interior and shall be subject to review and appropriate modification not less frequently than every five years by the Secretary of the Interior in accordance with rules and regulations of the Department of the Interior.

[5] Ch. 11, § 6, Utah Laws 1966 (2d Special Session).

Pursuant to the said legislation the State initiated this action. In its complaint the State claimed ownership of all lands surrounding the Lake and lying below the surveyed meander line. The State's claim is based on the theory that under the "equal footing" doctrine it acceded to the ownership of the entire bed of the Lake as of the date of statehood, January 4, 1896. The State further claims that the Lake bed at statehood included all of the lands lying below the meander line and that it has never been dispossessed of its ownership of these lands, except by express grant.

The U.S. claims a substantial portion of these lands on the basis of two theories. One theory is that by virtue of its ownership of uplands (lands above and contiguous to the meander line) it is entitled to lands lying below the surveyed meander line under the common law doctrine of reliction and accretion.[6] The other theory is that under the so-called Basart doctrine enunciated by the Department of Interior,[7] the U.S. is entitled to lands lying below the meander line and fronting on uplands owned by private fee owners. Apparently, the Basart doctrine is only applicable when at the time of a grant of patent of uplands by the U.S. there existed a substantial amount of exposed land between the meander line and the water's edge.

GSL owns lands in fee which are upland of a portion of those lands which are the subject of this controversy, and it owns options to obtain the interests, if any, in a portion of the lands in controversy claimed by other private

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[6] It is not clear as to whether the U. S. claims any rights to lands lying below the present water's edge.

[7] *Madison* v. *Basart*, 59 I. D. 415 (1947).

parties.[5] GSL's claims to lands lying below the meander line are based on the common law doctrine of reliction and accretion and conflict directly with the claims of both the original parties.

I. GSL IS AN INDISPENSABLE PARTY

As a fee owner of lands upland of the lands in controversy, GSL's legal and factual position is similar to that of Morton International, Inc., which has applied to intervene in this action as a defendant claiming adversely to both the State and U.S. Both Morton International, Inc. and the U.S. in their respective briefs have argued at length the reasons for considering certain upland fee owners, of which GSL is one, indispensable parties to this action. If the arguments of the U.S. and Morton International, Inc. are sustained insofar as the indispensability question is concerned, GSL would be equally indispensable. Nothing further need be added in supplementation to the positions taken by the U.S., the State and Morton International, Inc. on the issue of whether upland fee owners are indispensable to this action. Inasmuch as the question of this Court's jurisdiction has been raised by the State, GSL, as a non-Utah citizen, would not by its own presence in this litigation oust this Court of its original jurisdiction.

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[5] In addition to its fee lands GSL holds leases from the State embracing a portion of the lands in controversy and also has an option to lease additional portions. The option to lease has been exercised.

II. GSL HAS A RIGHT TO INTERVENE

Rule 9 of the newly-adopted Rules of Procedure of this Court provides:

> The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court.

Rule 24(a) of the Federal Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Pursuant to Rule 24(a), GSL, we submit, has the right to intervene in this proceeding.

A. GSL HAS A SUBSTANTIAL INTEREST IN THE CONTROVERSY

As noted above, GSL owns, among other interests, certain lands in fee, upland of the lands in controversy. Under the common law doctrine of reliction and accretion, GSL is the owner down to the water's edge of all the lands in controversy lying below its uplands. Its substantial interest in the controversy is enlarged by its options to obtain interests in reliction lands of similarly-situated upland fee owners. Thus the first requirement for intervention under Rule 24(a) is met.

B. GSL'S INTERVENTION IS NECESSARY TO PREVENT THE IMPAIRMENT OF ITS ABILITY TO PROTECT ITS SUBSTANTIAL INTERESTS

Although GSL may not be bound in the sense of *res judicata* by the result of this suit if it is not allowed to intervene, it nevertheless would find its ability to protect its interests impaired. Even if a decree entered herein purports only to decide the respective rights of the two original parties strictly as between themselves, an adjudication by this Court would be, at the least, highly persuasive authority on any issue of fact or law affecting GSL's rights in the lands in controversy. Thus, as a practical matter, GSL's ability to pursue its rights against the prevailing party in this action would be substantially jeopardized. Accordingly, GSL meets the second criterion set out in Rule 24(a).

C. GSL IS NOT ADEQUATELY REPRESENTED BY ANY OF THE EXISTING PARTIES

The U.S., State and GSL each claim fee ownership of the same portion of the lands in controversy. Since each of the original parties' interests are obviously adverse to those of GSL, neither adequately represents GSL's interests. Accordingly, GSL meets this criterion and all of the criteria set forth in Rule 24(a) and has a right to intervene.[9]

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[9] See *Atlantis Development Corp.* v. *United States*, 379 F.2d 818 (5th Cir. 1967); *International Mortgage & Investment Corp.* v. *Von Glemm*, 301 F.2d 857 (2d Cir. 1962); *Kozak* v. *Wells*, 278 F.2d 104 (8th Cir. 1960).

III. ALTERNATIVELY, GSL SHOULD BE PERMITTED TO INTERVENE.

Rule 24(b) of the Federal Rules of Civil Procedure provides:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

GSL's ownership interests in the land in controversy necessarily involve a determination of the same legal and factual issues which have been raised by the U.S. and the State. Therefore, GSL's presence will not unduly delay or prejudice the adjudication of the rights of the original parties. Additionally, GSL's presence will enable this Court to shape its relief so as to do justice to the private claims here involved as well as to render more complete and satisfactory relief to the U.S. and the State. There are thus good reasons why in the exercise of its equitable and discretionary powers this Court should allow GSL to intervene under Rule 24(b).

IV. ALL THE CLAIMS ASSERTED BY GSL ARE WITHIN THIS COURT'S ORIGINAL JURISDICTION

The question has been raised whether intervenors in this action may assert claims against the U.S. since Article III, Section 2, United States Constitution, does not by its terms contemplate a suit between a private party and the U.S. within the original jurisdiction of this Court. While we have found no authority directly comparable to the factual situation in the instant case, we are of the opinion that this Court unquestionably has jurisdiction of the main action by virtue of the character of the original parties.[10] In other cases in which the U.S. was plaintiff and a state defendant in original actions, this Court has allowed private parties to assert defenses similar to the cross claim which GSL proposes to assert against the U.S. in this action.[11] Therefore, we submit that GSL's claims against the U.S. in this action are, for jurisdictional purposes, merely ancillary to the main action. This Court has previously recognized that in original actions it possesses ancillary jurisdiction.[12] Thus, GSL should be allowed to assert its claims against the U.S.

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[10] *United States* v. *Texas*, 143 U.S. 621 (1892).

[11] *United States* v. *Wyoming*, 331 U.S. 440 (1947); *United States* v. *West Virginia*, 295 U.S. 463 (1935).

[12] *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

CONCLUSION

Notwithstanding and apart from the disposition of any issue respecting GSL's indispensability in this action, GSL clearly satisfies the criteria of Rule 24(a) and 24(b). It is thus respectfully submitted that GSL should be allowed to intervene in this action either as plaintiff pursuant to its original motion, or in the alternative, as defendant, for the reasons set forth in this Supplemental Motion.

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

February 18, 1968.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*.

ANSWER AND CROSS CLAIM OF DEFENDANT GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

I

This Defendant, GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION (hereinafter called "GSL"), a Delaware corporation, admits the allegations of Paragraph I of the State of Utah's Complaint (hereinafter called "the Complaint").

II

This Defendant denies the allegations contained in the first sentence of Paragraph II of the Complaint claiming that the State of Utah owns the lands that are the subject

of this action; admits the remaining allegations contained in Paragraph II.

III

This Defendant admits that the Great Salt Lake is navigable; denies the remaining allegations contained in Paragraph III of the Complaint insofar as said allegations may be construed to be allegations of fact.

IV

This defendant is without sufficient information to admit or deny the allegations contained in sentences 1 and 2 of Paragraph IV of the Complaint; admits the allegations contained in sentence 3 of Paragraph IV; has insufficient information to admit or deny the allegations contained in sentences 4 and 5 of Paragraph IV; admits the allegations contained in sentences 6 and 7 of Paragraph IV; has insufficient information to admit or deny the allegations contained in sentences 8 and 9 of Paragraph IV; admits the allegations contained in sentences 10, 11 and 12 of Paragraph IV; admits the allegations in sentence 13 of Paragraph IV that the claim of ownership of the subject lands by the United States is adverse to the claims of ownership of the State of Utah; denies the remaining allegations of sentence 13 of Paragraph IV; admits the allegations of sentence 14 of Paragraph IV so far as it affects lands claimed by GSL; has insufficient information to admit or deny the remaining allegations of sentence 14 of Paragraph IV; alleges that this Defendant is the sole owner of all right, title and interest in and to that portion of the subject lands

lying below the surveyed meander line and contiguous to this Defendant's uplands which are more fully described in this Defendant's Cross Claim, *infra*, p. 14.

V

This Defendant admits the allegations in sentences 1, 2 and 3 of Paragraph V of the Complaint; has insufficient information to admit or deny the allegations in sentence 4 of Paragraph V; admits the allegations of sentences 5, 6, 7 and 8 of Paragraph V; has insufficient information to admit or deny the allegations of all the remaining sentences of Paragraph V.

VI

This Defendant denies each and every allegation of the Complaint not specifically admitted, denied or qualified herein.

WHEREFORE, Defendant GSL prays the Court to quiet its title to its said lands lying below the surveyed meander line of the Great Salt Lake as against the claims of Plaintiff and to grant this Defendant such further relief as the Court deems just and equitable.

CROSS CLAIM

I

GSL is the owner in fee of certain uplands, one described boundary of which is the surveyed meander line of the Great Salt Lake; said uplands are described as follows:

Township 6 North, Range 4 West, S.L.M.
Section 7: W½NE¼, NW¼SE¼, E½NW¼, NE¼SW¼, and Lots 1, 2 and 3

Township 6 North, Range 5 West, S.L.M.
Section 2: Lots 2, 3, 4, 5 and 6 and S½ (20 acres) of Lot 1 and NW¼SW¼ and SW¼NW¼
Section 3: SE¼ and S½NE¼
Section 11: Lot 1

III

Said uplands have at all times been riparian to the Great Salt Lake.

III

Of the subject lands of this controversy, GSL is the owner of that portion which is contiguous to the above described uplands and which lies below the meander line of the Great Salt Lake.

IV

The portion of the subject lands in controversy claimed by GSL belongs to it by virtue of the common law doctrine of reliction and accretion.

V

The United States of America wrongfully and unlawfully asserts title to GSL's lands lying below the surveyed meander line and threatens to dispossess GSL thereof, all to GSL's great continuing and irreparable damage.

VI

Defendant GSL has no adequate remedy at law.

WHEREFORE, Defendant GSL prays the Court to quiet its title to its lands lying below the surveyed meander line of the Great Salt Lake as against the United States and to grant Defendant GSL such other relief as the Court deems just and equitable in the premises.

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D.C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

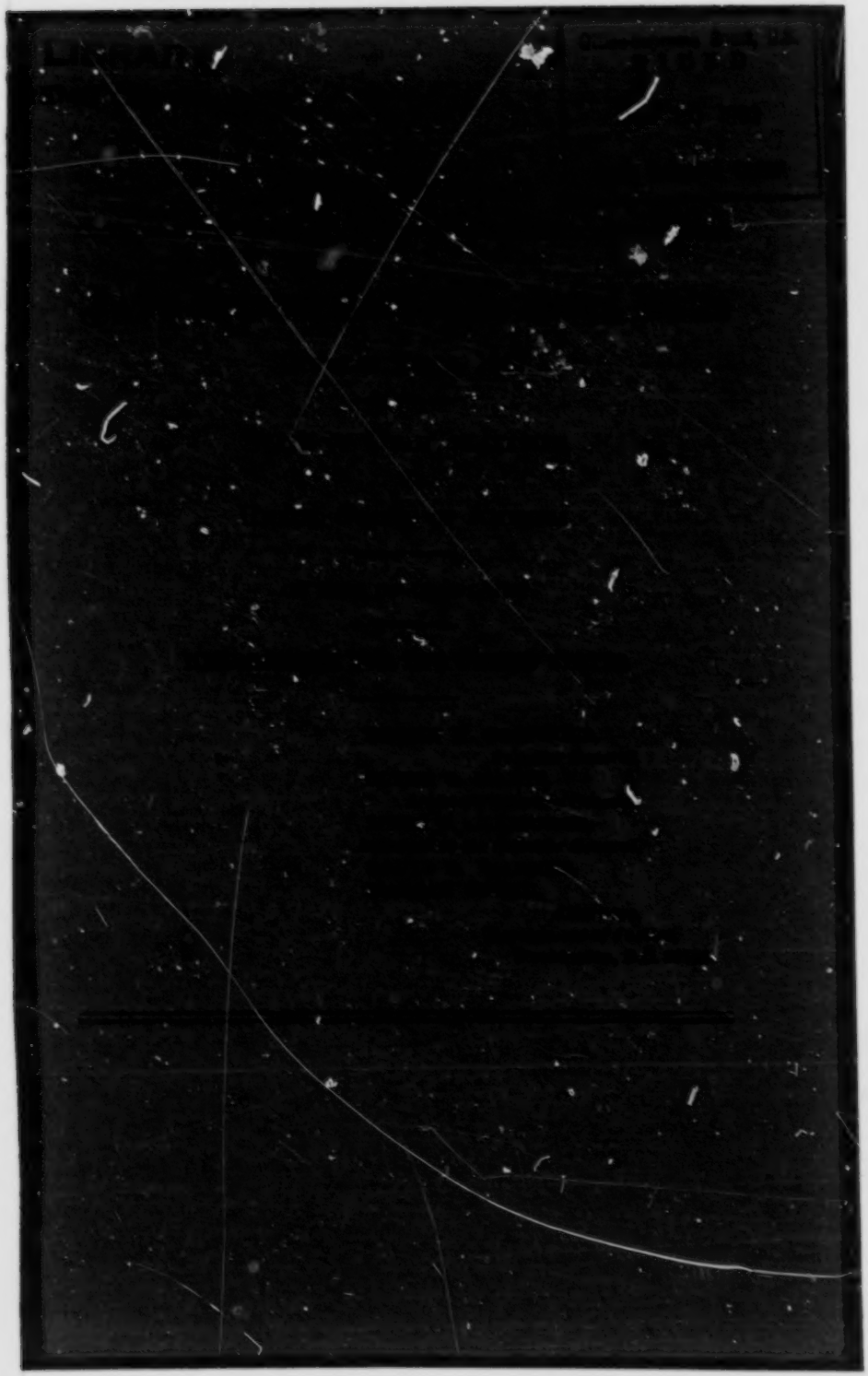
February 18, 1968.

CERTIFICATE OF SERVICE

I, GEORGE E. BOSS, Counsel for Great Salt Lake Minerals & Chemicals Corporation, applicant for Intervention herein, and a member of the Bar of this Court, hereby certify, in accordance with Rule 33 of the Rules of this Court, that five (5) copies of the foregoing Motion, Answer and Cross Claim were served by mail upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530, Counsel for Defendant United States of America; L. M. McBride and Frank Wollaeger, of McBride, Baker, Wienke & Schlosser, 110 North Wacker Drive, Chicago, Illinois 60606, and Myer Feldman and Martin Jacobs, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for Morton International, Inc.; and the Attorney General of the State of Utah, State Capitol Building, Salt Lake City, Utah 84114, Counsel for the State of Utah, this 18th day of February, 1968.

GEORGE E. BOSS

February 18, 1968.



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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

Beginning in the 1850's, various portions of the public lands adjoining Great Salt Lake have been surveyed, with a meander line approximating the shore of the Lake as it then existed. Although the level of Great Salt Lake has fluctuated over the years, its general trend has been downward. As a result, the meander lines, drawn for the most part years ago, are in some cases thousands of feet, and in other cases several miles, inland of the present water line of Great Salt Lake. Ownership of these relicted lands, between the meander line and the water's edge, is the principal subject matter of this controversy.

The State of Utah claims all these lands as part of the original bed of Great Salt Lake, which it as-

serts is and was a navigable body of water, under the doctrine of *Pollard* v. *Hagan,* 3 How. 212. Private patentees from the United States who owns lots on the meander line claim the relicted acreage adjoining their lands under the common law doctrine of reliction. Invoking the same principle, the United States, as littoral owner, claims the balance of the relicted acreage—some 325,000 acres. See *State of Utah,* 70 I.D. 27 (1963). Moreover, wherever the water line was a substantial distance from the meander line at the time of the issuance of a patent, the United States claims the appurtenant relicted lands as the true littoral owner under the so-called *Basart* doctrine. See *Madison* v. *Basart,* 59 I.D. 415 (1957).

Attempts to settle by legislation this controversy between the State of Utah and the United States resulted in the passage of the Act of June 3, 1966 (80 Stat. 192). Section 1 of the Act directs the Secretary of the Interior to complete the public land survey around the Great Salt Lake by closing the meander line "following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed areas." Section 2 directs the Secretary to convey to the State of Utah "all right, title, and interest of the United States in lands * * * lying below the meander line of the Great Salt Lake * * *." Section 5 requires the State either to pay the fair market value of the lands conveyed to it, or to maintain an action in the Supreme Court "to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section

2 * * *," the United States consenting to be joined as a defendant to such an action. The State has elected to initiate this action. See Laws of Utah, 1966, 2d Spec. Sess., ch. 11.

On March 1, 1967, the Attorney General of the State of Utah filed in the Supreme Court a Motion for Leave to File a Complaint, and a Complaint. The only defendant named in the complaint is the United States of America. On May 15, 1967, the Court granted the State of Utah's motion for Leave to File a Complaint (387 U.S. 902), and on June 12, 1967, appointed a Special Master (388 U.S. 902). On July 14, 1967, the United States filed an Answer to the State's complaint. In September 1967, Morton International, Inc., a Delaware corporation, filed a Motion for Leave to Intervene as a defendant in the matter, and an answer to the Complaint of the State of Utah, claiming certain lands below the meander line of Great Salt Lake which both the United States and Utah claim to own. On October 23, 1967, the Motion of Morton International Inc., for leave to intervene and file an answer was referred to the Special Master (389 U.S. 909). In November 1967, the United States responded that it had no objection to the intervention of Morton International, Inc., as a defendant in the action.

Certain questions relating to the intervention of Morton International, Inc., having been raised by the State of Utah and the Special Master, all counsel were requested by the Special Master to address themselves to the following issues:

1. Is an owner of land which is adjacent to and above the meander line of Great Salt Lake, who claims to own either on the basis of the doctrine of reliction, or because of the alleged nonnavigability of the Lake, land below the meander line of Great Salt Lake, an indispensible party to this action?

2. If the answer to the first question is in the affirmative, then, in those cases where such owners are citizens of the State of Utah, would their joinder to this action as parties defendant oust this Court of its jurisdiction over the matter?

The answer of the United States to the first question is, Yes, and to the second question, No.

ARGUMENT

I

AN OWNER OF LAND ADJACENT TO AND ABOVE THE MEANDER LINE OF GREAT SALT LAKE, WHO CLAIMS ON THE BASIS OF THE DOCTRINE OF RELICTION, OR OTHERWISE, TO OWN LAND BELOW THE MEANDER LINE OF GREAT SALT LAKE, IS AN INDISPENSABLE PARTY TO THIS ACTION

As indicated in the Statement, the United States, where it was the original littoral owner and has not conveyed its title, claims, under the doctrine of reliction, all the adjacent lands which have become uncovered by the recession of the water of the Lake. Yet, if the doctrine of reliction is applicable to this case, it inures to the benefit not only of the United States, but of all littoral owners similarly situated. Morton Salt advances such a claim and the records of the Department of the Interior disclose that there are over 100 other private property owners in the same

position. Thus, insofar as Utah here seeks to quiet its title to *all* of the relicted lands (Complaint, para. III), it is obvious that its claim cannot be adjudicated without the joinder of these private claimants, the only adverse parties with respect to some portion of the acreage in suit.

Nor is the State of Utah the only party claiming adversely to the claims of the private owners; the United States, also, asserts a claim against some of them. As already noted, those against whom this claim is asserted are persons whose land was not littoral at the time title passed from the government, because the meander line of the Lake as shown on the official plats of survey, to which their patents referred, was then many thousands of feet, and sometimes many miles, from the edge of the waters of the Lake. In these instances, the United States claims the benefit of the reliction as the true littoral owner under the *Basart* doctrine. As to those areas—estimated to comprise some 108,000 acres—the private landowners are therefore claiming adversely to both Utah and the United States and the title of neither sovereign can be quieted without adjudicating their rights.

The case being in this posture, it follows that any and all persons who claim title to any of the relicted lands along the shores of Great Salt Lake necessarily are indispensable parties to this action. Indeed, the private landowners are clearly "[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determina-

tion may be wholly inconsistent with equity and good conscience." *Shields et al.* v. *Barrow,* 17 How. 130, 139. See, also, *McShan* v. *Sherrill,* 283 F. 2d 462.

II

THE JOINDER TO THIS ACTION OF CITIZENS OF UTAH AS PARTIES DEFENDANT WOULD NOT DIVEST THE SUPREME COURT OF ITS JURISDICTION OVER THE CASE

In its present posture, this case is one initiated by the State of Utah against the United States as sole defendant. The United States having waived its sovereign immunity, no one contests that such an action is within the original jurisdiction of the Supreme Court. It is suggested, however, that the joinder of citizens of Utah as additional defendants would oust the Court's jurisdiction. We think not.

The question is ultimately ruled by the first two paragraphs of Section 2 of Article III of the Constitution, which provide as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the

> Citizens thereof, and foreign States, Citizens or Subject.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Excerpting what seems relevant here, we find that "[t]he judicial Power shall extend * * * to Controversies to which the United States shall be a Party," and that in "all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction." Reading "all cases" to mean "all cases before mentioned," we immediately reach the conclusion that the present action is within the Court's original jurisdiction.

It is not apparent how that jurisdiction can be defeated by the joinder of other parties. Certainly, Article III does not restrict federal jurisdiction premised on the presence of the United States as "a party" to the situation in which it is sole plaintiff or sole defendant. See, *e.g.*, 28 U.S.C. 1347. Nor does the Supreme Court's original jurisdiction of such an action depend upon the State's being the only party on the other side. See, *e.g.*, *United States* v. *West Virginia*, 295 U.S. 463, 470–471.

What, then, is the obstacle? Is there some overriding principle, albeit not expressed in Article III, that no federal court, or at least the Supreme Court,

can ever entertain a case, otherwise within its jurisdiction, because the contest is in part between a State and its own citizens? Plainly, the judicial power of the United States is not defeated on that account. To be sure, it has been settled since *Hans* v. *Louisiana,* 134 U.S. 1, that a citizen could not sue his State in the federal courts without its consent. But that is because of the principle of sovereign immunity, reflected in the Eleventh Amendment. Indeed, such a suit on a federal claim is within the jurisdiction of the United States courts if the State has consented. See *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 186, and cases cited. And while a State rarely chooses the federal forum to sue her own citizens, the removal cases demonstrate that there is no bar to such an action in the United States courts if a federal question is presented. *E.g., Georgia* v. *Rachel,* 384 U.S. 780.

Plainly, the judicial power of the United States extends to a suit, otherwise within federal jurisdiction, in which a State and its citizens are opponents. Given that starting point, it would be difficult to rationalize a rule that absolutely prohibited the Supreme Court, unlike other courts, to entertain such an action originally, although the case was otherwise within its original jurisdiction. We submit no such rule prevails.

To be sure, it has been held that the Supreme Court cannot entertain an original action presenting only local law issues brought by a State against some of its own citizens and citizens of another State. See *California* v. *Southern Pacific Co.,* 157 U.S. 229, 257, 258, 261; *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 246–247; *Louisiana* v. *Cummins,* 314 U.S. 577.

But that is presumably because such a case is beyond the jurisdiction of *any* federal court, on the view that the provision of Article III extending the judicial power of the United States to controversies "between a State and Citizens of another State," like the next clause, requires complete diversity. Cf. *Strawbridge* v. *Curtiss*, 3 Cranch 267.

There remains a troublesome *dictum* in *Southern Pacific, supra*, 157 U.S. at 261, and the uncritical alternative holdings in *New Mexico* v. *Lane*, 243 U.S. 52, 58, and *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 163–165.

Southern Pacific was an original action brought by the State of California in the Supreme Court to establish its title to certain lands below the line of ordinary high tide of San Francisco Bay, claimed by the Southern Pacific Company under a grant from the City of Oakland. Having determined that the City of Oakland and the Oakland Water Front Company were indispensable parties to the litigation, the Court concluded it did not have original jurisdiction of the case because it was one between the State of California on the one hand and the citizen of another State and citizens of California on the other. Insofar as that holding merely reflects the "total diversity" principle to which we have previously adverted, the ruling is wholly irrelevant here. But, although it appears no federal question was presented, the Court went on to observe (*id.* at 261–262):

> * * * we are not called on to consider * * * whether any Federal question is involved, since the original jurisdiction of this court in cases

its consideration and approval prior to the commencement of further proceedings in this matter.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

CLYDE O. MARTZ,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

DAVID R. WARNER,
MARTIN GREEN,
Attorneys.

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SUPREME COURT, U. S.

No. 31, Original.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

STATE OF UTAH, RELATOR,

v.

UNITED STATES OF AMERICA.

ON BILL OF COMPLAINT.

REPLY MEMORANDUM FOR THE UNITED STATES.

[illegible]
Special Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

REPLY MEMORANDUM FOR THE UNITED STATES

We address ourselves briefly to Points I and II of Utah's brief, not previously discussed in our memorandum. In these sections of its brief, the State argues that intervention by Morton International and other private littoral landowners is barred because the participation of those parties would constitute (1) unconsented suits against the State and (2) unconsented suits against the United States.

I

The Eleventh Amendment prevents any federal court from entertaining an unconsented suit against a State by citizens of another State, even on a federal claim *Louisiana* v. *Jumel,* 107 U.S. 711. And like principles of sovereign immunity insulate a State

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from being compelled to answer a suit brought by its own citizens in federal court. *Hans* v. *Louisiana,* 134 U.S. 1. On the other hand, if the State has consented, the federal courts are competent to adjudicate a claim, otherwise within federal jurisdiction, filed against the State by its own citizens or citizens of another State. See *Parden* v. *Terminal Co.,* 377 U.S. 184, 186, and cases cited. Accordingly, the question on this branch of the case is whether Utah may fairly be deemed to have waived its sovereign immunity so as to permit a suit against it by private citizens with respect to the lands claimed by it in the present suit.

In our view, the State's action in asserting title to the disputed lands and submitting that question for adjudication constitutes consent to the determination of any adverse claim with respect to the same *res.* It is elementary that he who asks judgment in his favor submits himself to the risk of an adjudication in favor of his opponent. Even sovereigns are not exempt from this principle. See *United States* v. *The Thekla,* 266 U.S. 328, 339–340. To be sure, a suit to collect a money judgment does not waive sovereign immunity with respect to a counterclaim for a greater sum. *United States* v. *Shaw,* 309 U.S. 495. But when a sovereign invokes the aid of the courts to settle its claim to a certain asset, it must be taken to have consented that opposing claims to the same asset should be entertained. *Clark* v. *Barnard,* 108 U.S. 436, 447–448. That is obvious in the case of the named defendant. *E.g., United States* v. *Louisiana,* 363 U.S. 1, 84. Nor is it apparent why the principle does not apply to intervening claimants, especially if they are

indispensable parties. Cf. *Gunter* v. *Atlantic Coast Line,* 200 U.S. 273.

In sum, we believe neither the Eleventh Amendment nor any rule of sovereign immunity prevents the Court from entertaining the claims of Morton International or other private parties insofar as they assert ownership to the lands which Utah has chosen to place in litigation by praying that its own title thereto be quieted. We accordingly conclude that all of the private claimants should be allowed to intervene to assert their title as against the State with respect to the acreage also claimed by both Utah and the United States. On the other hand, we note that the Court need not resolve disputes between the State and private claimants *with respect to lands disclaimed by the United States* in order to fulfill the immediate objective of the Great Salt Lake Lands Act. Indeed, strictly construed, the Act authorizes the present suit only to determine the extent of the *federal* lands in the area so as to fix the amount due the United States by Utah upon their transfer to the State. For that purpose, it is unnecessary to settle the State's title to lands which are adversely claimed by other persons, but not by the United States. And the United States is of course a disinterested bystander with respect to that controversy. Yet, since the same principles govern, it would seem appropriate in the interest of efficient judicial administration to resolve that controversy here also, if, as we believe, it encounters no jurisdictional obstacles and presents no special complexities.

II

It remains to answer the contention that the intervention of Morton International and other private claimants would constitute unconsented suits against the United States.

No doubt, Congress might have waived sovereign immunity for the sole purpose of permitting Utah alone to assert its claims against the United States. Cf. *United States* v. *Sherwood,* 312 U.S. 584. Indeed, a grudging reading of the jurisdictional statute authorizing this suit might reach the conclusion that no more was intended here. We reject that construction, however, because it would effectively defeat the purpose of the Great Salt Lake Lands Act, 80 Stat. 192, in consenting to the present suit.

Section 5 of the Act provides that the State of Utah "may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States" in the lands below the meander line of the Lake. The purpose of this determination is to fix the liability, if any, of the State toward the United States for these lands which are to be relinquished to the State. Yet, if there are other claimants, besides Utah, it is obvious that the title of the United States cannot be determined without adjudicating those claims as well. Nor is the United States entitled to payment for the lands if the true owners are the private claimants. Thus, it seems plain that the object of the suit will be frustrated unless all claims adverse to the United States are now adjudicated. In these circumstances, we sub-

mit the jurisdictional act must be construed as permitting, by necessary implication, the assertion and disposition of all claims of ownership with respect to the lands disputed between the State and the United States.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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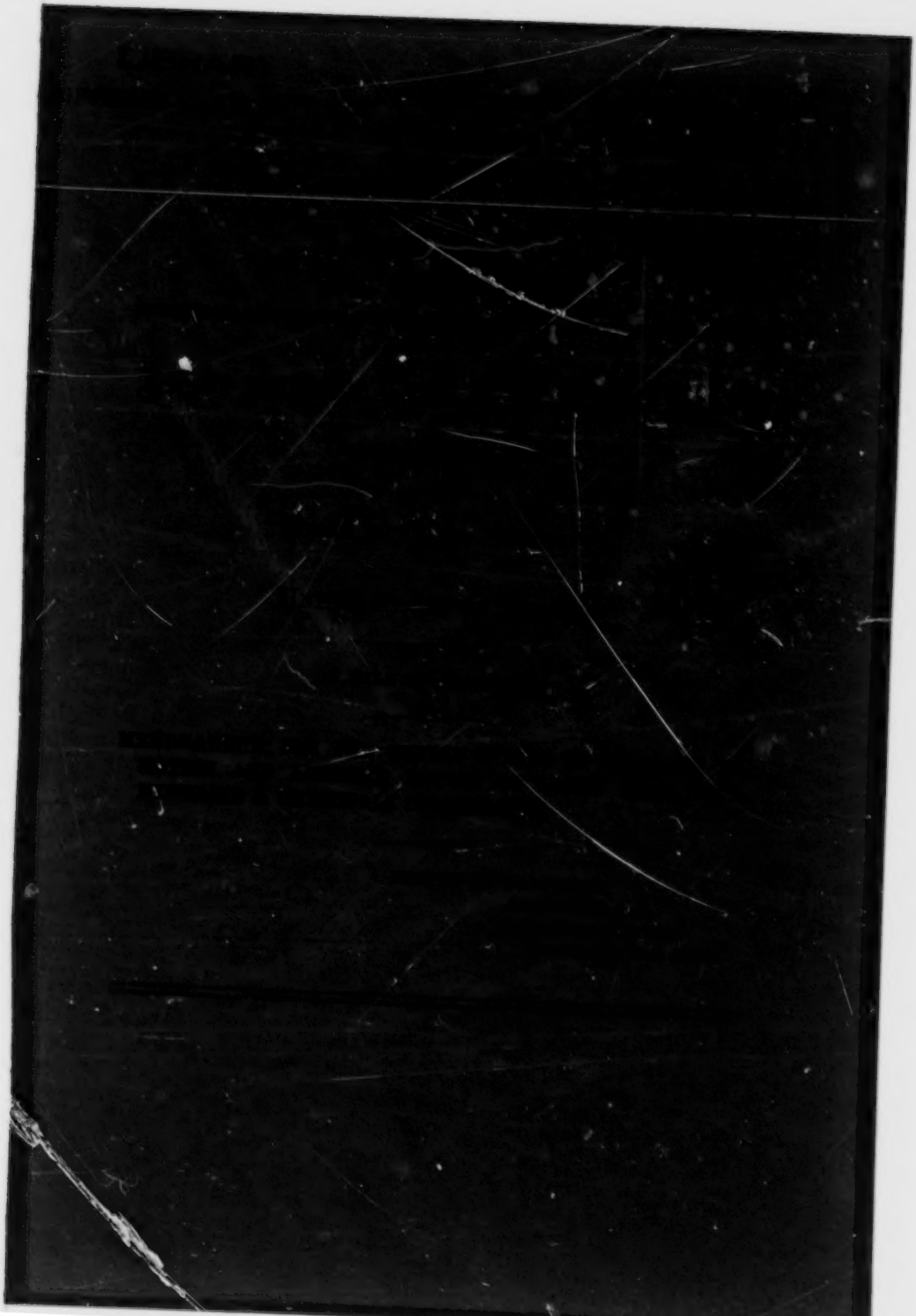

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO MOTION AND AMENDED MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

The United States does not oppose the intervention of Great Salt Lake Minerals & Chemicals Corporation, whether as a plaintiff or a defendant, insofar as that company claims, as fee owner, lands below the meander line of the Great Salt Lake which are also claimed by the United States and the State of Utah. Although the tracts involved are relatively small, it appears that there are such adverse claims. To that extent, the mover is in the same position as Morton International, Inc., and is, in our view, likewise an indispensable party whose joinder would not defeat the Court's jurisdiction and whose claims do not constitute un-

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consented suits against the State of Utah or the United States. See Memorandum for the United States filed in January, 1968, and Reply Memorandum for the United States filed in February, 1968.

On the other hand, the United States opposes the intervention of Great Salt Lake Minerals & Chemicals Corporation, insofar as it claims as a lessee from the State of Utah. The sole object of this suit is to determine the title of the United States to the lands of below the meander line of the Great Salt Lake and leasehold interests, derived from other claimants, cannot affect that question. Nor is it likely that the outcome of the title dispute between Utah and the United States will affect the mover, as lessee from the State, since the contemplation of the statute is that the State will become the fee owner of all the lands, upon appropriate payments to the United States, and presumably will be bound by its leases. At all events, it would seem that the State can be expected adequately to represent all those who hold lesser interests under it. In these circumstances, we believe the intervention of Utah's lessees would unnecessarily burden the litigation.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1968.

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IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

BRIEF OF THE STATE OF UTAH IN RESPONSE TO

THE REPLY BRIEFS OF THE UNITED STATES
THE REPLY BRIEF OF MORTON INTERNATIONAL, INC.
THE MOTION AND BRIEF TO INTERVENE BY GREAT SALT LAKE MINERALS AND CHEMICALS CORPORATION

Phil L. Hansen
Attorney General of Utah
Counsel for Plaintiff
236 State Capitol Building
Salt Lake City, Utah

February 23, 1968

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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

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BRIEF OF THE STATE OF UTAH IN RESPONSE TO

THE REPLY BRIEFS OF THE UNITED STATES
THE REPLY BRIEF OF MORTON INTERNATIONAL, INC.
THE MOTION AND BRIEF TO INTERVENE BY GREAT SALT LAKE MINERALS AND CHEMICALS CORPORATION

SUMMARY OF ARGUMENT

The Court must first determine whether Morton International, Inc. (herein referred to as Morton), the

Great Salt Lake Minerals and Chemicals Corporation (herein referred to as GSL), and other private claimants are indispensable parties to the present action. If they are not indispensable, the case can proceed without jurisdictional impediment. If they are indispensable, then there are five separate questions relating to jurisdiction which must be considered and determined.

Two of the jurisdiction questions concern sovereign immunity from suit, *i.e.*, whether either the State of Utah or the United States has consented to suit in this action by private persons. The third question of jurisdiction is whether Congress has implemented the constitutional judicial power in original actions in this Court for claims against a state by citizens of another state. The fourth and fifth questions of jurisdiction relate to the existence of any federal jurisdiction in original actions for claims between a state and its own citizens, or for claims between the United States and a citizen of a state. If any one of the five questions of jurisdiction should be resolved against the existence of jurisdiction, then that determination will be fatal to any further proceedings in this litigation.

Utah will argue in this brief that Morton and GSL are not indispensable, that they have no right to intervene, and that they should not be permitted to intervene. Further, it will be contended that intervention would destroy the jurisdiction of the Court.

Since this brief is responsive to several reply briefs filed by the United States and Morton, organization is better served and duplicity is more easily avoided by following the points stated in the outline of argument,

rather than responding separately to each of the reply briefs to which this brief responds. All material points in those reply briefs are answered in this brief, but the relevant points are discussed as they apply to the various points of argument in this brief. With respect to GSL, however, a very short summary is included as Point III of this brief because the position occupied by GSL is somewhat different from the position occupied by Morton.

ARGUMENT

POINT I

MORTON AND THE OTHER PRIVATE CLAIMANTS ARE NOT INDISPENSABLE PARTIES TO THE PRESENT LITIGATION.

A. THERE WILL BE NO ADJUDICATION OF TITLE AS TO ANY LANDS IN WHICH MORTON CLAIMS AN INTEREST.

The present action is not one to quiet title. The United States owns no part of the subject lands. Any interest which the United States owned prior to June 15, 1967, was conveyed to the State of Utah by a quit claim deed issued that date, as required by the Great Salt Lake Lands Act. Thus, it is obvious that there will be no adjudication at all directly affecting title. Since Utah now has whatever title the United States had, Utah will still have the same title after the litigation is concluded. Any decree which might be rendered

in this action will have absolutely no affect on the status of the title, but will only determine whether Utah is required to pay the United States for land purportedly conveyed by the deed. That will be the impact, and the only impact, of this litigation.

The United States claims that it owned and quit-claimed to the State of Utah approximately 433,000 acres of reliction lands. Utah denies that these lands are reliction lands, and thus denies that the United States had any ownership interest to convey. So, while Utah acknowledges that it has received by conveyance whatever interest the United States had, Utah claims that it actually received nothing under the deed and should pay for nothing.

The ownership claims which Morton would seek to inject into this proceeding do no more than confuse and mislead. This is so because Morton asserts that the Court in this action will be adjudicating directly on the ownership of lands which Morton claims to own. This simply isn't so. Perhaps the nature and extent of the private claims can best be summarized by distinguishing them from the claims of Utah and the United States.

1. *Claim of Utah.* Utah claims that as an attribute of statehood on January 4, 1896 it received title to the entire bed of the Great Salt Lake, a navigable body of water situated in Utah. In this regard, Utah claims that the surveyed meander line of the lake represented the mean high water mark of the lake at the date of statehood, and all lands within and below the surveyed meander became the property of Utah. Since the date of statehood, the water level of the lake has lowered, ex-

posing more than 600,000 acres of land between the present water's edge and the surveyed meander line. Utah claims that the lowering of the water was not a natural process but was essentially the result of artificial diversions from the tributaries feeding the lake. Hence, the exposed lands are not reliction lands and Utah has not lost title to them.

2. *Relicition Claims by United States and Private Parties.* The entire 600,000 acres of exposed lands are claimed as reliction lands by the riparian owners of the upland adjacent to and surrounding the surveyed meander. Each riparian owner thus claims by reliction the land lakeward from his fee land immediately above the meander. The United States has retained ownership of substantial land above the meander, and its direct reliction claim to the exposed lands lakeward from these retained uplands approximates 325,000 acres. The balance of the land immediately above the surveyed meander has been patented to private persons, and their combined reliction claims to the exposed lands lakeward from their patented lands approximate 275,000 acres. Thus, of the 600,000 acres, the United States claims 325,000 acres by direct reliction and private persons similarly claim the balance of 275,000 acres.

3. *Basart Conflict Between the United States and Private Claimants.* Part of the 275,000 acres claimed by private persons is also claimed by the United States. This claim by the United States is commonly referred to as the Basart doctrine, and it extends to approximately 108,000 acres of exposed lands. The essence of this doctrine is that where the land immediately above the surveyed meander was patented to a private person

at a time when there existed a substantial amount of exposed land below the meander, the patentee took title only to the land above the meander as described in the patent. The United States thus retained ownership of the exposed land below the meander and remained the riparian owner, entitling it to all further "relictions." The private patentees against whom this claim is asserted by the United States generally deny the validity of the *Basart* doctrine. But the applicability of that doctrine to the Great Salt Lake is a question only as between the United States and the private claimants — and has nothing to do with the State of Utah (except to the extent that Utah is now the grantee of the United States, as will be discussed below).

To summarize, the 600,000 acres of exposed lands fall into the following three categories:

1. 325,000 acres claimed by the United States as direct reliction lands, and as to this category Utah and the United States are the only claimants;

2. 167,000 acres claimed by private persons as reliction lands, and as to this category Utah and such private persons are the only claimants—and this land is not in issue in this litigation;

3. 108,000 acres claimed by private persons as reliction lands and also claimed by the United States as "Basart" reliction lands. As to this category, Utah, the United States and private persons all claim ownership, and it is this category only that gives rise to the question of indispensable parties. For simplicity of reference, this category will be designated as "Basart lands" in this brief.

These three categories of exposed lands are illustrated in a diagram included as an appendice at page 76 of this brief.

It should be reasonably apparent that the Court will make no *adjudication* in this litigation with respect to the Basart lands. The basic claim of Utah as against the United States is simply that the exposed lands are not reliction lands. This question has nothing to do with the Basart doctrine. If the Court should determine that these exposed lands are reliction lands, it would then — and only then — be relevant to inquire as to which competing claim of reliction should prevail. But those competing claims are solely between the private claimants and the United States. Utah does not claim reliction. Utah denies reliction — and if the exposed lands are reliction lands, Utah has lost its claim of ownership.

The litigation, then, will necessarily take the following course. The Court first must determine whether the exposed lands are reliction lands. If they are not, then the United States has lost its claim of title, will get no payment for its deed to Utah, and the litigation will end there. If they are reliction lands, then Utah has lost its claim of title, will recognize conveyance of title by the deed from the United States, and the litigation will end there. In neither event will the Court ever reach any determination as to whether the Basart doctrine should apply, or proceed to any adjudication as to the competing reliction claims of the United States and the private claimants.

It must be remembered that Utah now holds whatever title the United States previously held. If Utah

loses its claim that the exposed lands are not relicted, then it will pay the United States for both the direct reliction lands and also the Basart reliction lands — without any further adjudication as to the latter.

Of course, in any subsequent litigation between Utah and the private claimants, Utah might well claim title to the Basart lands as the grantee of the United States. That question would not have been determined, and it would be a proper issue for determination in such subsequent litigation.

But this course of events certainly cannot harm Morton or any other private claimants. Indeed, exactly the same result would have followed if Utah had made a direct purchase from the United States without litigation. There is no difference in legal result between a direct purchase, or litigation to establish the necessity, or lack thereof, for payment.

The only conceivable impact on Morton and the other private claimants is that if and when the Basart question is adjudicated, it will be an adjudication between Utah (as the successor in interest of the United States) and the private claimants, rather than between the United States and the private claimants. Certainly no decree by the Court in the present proceeding will in any way enhance or improve the position of Utah subsequently to assert the Basart doctrine, beyond the present position of the United States to assert it. Likewise, nothing which will occur in this action can diminish the position of the private claimants in subsequently resisting that doctrine. And it cannot be supposed that

the private claimants are more fearful of litigation with Utah than with the United States.

If, in such subsequent litigation, the private claimants should prevail over Utah, Utah would not own the land, even though it had paid the United States for it. If Utah decided that the public interest required state ownership as to all or part of such land, then Utah would either have to buy it from, or initiate eminent domain proceedings against, such private owners.

Therefore, the only conceivable "unconscionable" result which could flow from the present litigation would be to the detriment of Utah — not the United States and not the private claimants.

The position of the private claimants has been discussed fully above. As to the United States, it cannot be harmed by the absence of the private owners, since it conveyed by *quit-claim* deed only and is entitled to payment for any interest conveyed. The United States has no duty to account at any time to any private owners for funds paid by the State of Utah for the ownership interest of the United States.

Utah, on the other hand, does have some risk in this litigation as to the 108,000 acres of Basart lands, because Utah might pay the United States for such land as a result of the present litigation, and then, as a result of subsequent litigation, find that it did not get what it paid for, and if it needs such land, face the necessity of paying for it a second time. But Utah much prefers to assume this risk of double liability compared with the alternative economic harm which would result

from having no title determination now. The latter result would be critically injurious to the mineral, industrial and recreational development of the lake, and would be far more damaging to Utah than any risk of double liability that might ultimately result from the present litigation and any subsequent title suits.

The only other potential question in this litigation in which Morton could possibly have a legitimate interest is the navigability of the Great Salt Lake. Suffice to say that the United States has not yet placed that question in issue. If it does not, there will be no determination, and Morton will not be harmed; if it does, Morton will not be bound by any such determination.

B. THE PRAGMATIC TEST OF INDISPENSABILITY AS ANNOUNCED BY PROVIDENT IS APPLICABLE TO THE CASE AT BAR.

Four days after Utah filed its printed brief on January 25, 1968, the United States Supreme Court handed down its opinion in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 36 Law Week 4157 (Jan. 29, 1968). In Utah's brief the Court of Appeals decision was criticized, and it was argued that the dissenting opinion better represented the pragmatic test of indispensability as embodied in Rule 19. The Supreme Court reversed, holding that the question of indispensability is not determined as a matter of substantive right but is determined by the practical factors of each case, and citing many of the same cases, law review articles and treatises as had been cited by Utah.

The basic reason for the reversal was summarized as follows:

> Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid, we reverse. (at page 4158)

The Court then proceeded to evaluate the four practical factors mentioned by Rule 19 which should be viewed in each case, along with any other relevant practical factors:

> First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists. (at page 4158)

> Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. (at page 4158)

> Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty. (at page 4159)

> Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. (at page 4159)

> Rule 19 (b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. (at page 4159)

It is interesting to note the Court stressed that while the generalizations of *Shields v. Barrow*, 17 How.

130 (1854) were still valid today, the Court in that case "attempted, perhaps unfortunately, to state general definitions of those persons without whom litigation could or could not proceed" (at page 4163). Further, the Court quoted with apparent approval from Reed:

> Reed, *supra*, n. 2, comments that much later difficulty could have been avoided had this Court pointed the way in *Shields* by undertaking a practical examination of the facts. *Id.*, at 340-46. He concludes that "The facts in the opinion are insufficient to demonstrate that the result is a just one." *Id.*, at 344. (at page 4163, n. 21)

At pages 40-47 of Utah's brief of January 25, 1968 the important practical aspects of the case at bar are evaluated. Morton has attempted to dismiss these practical facts as "irrelevant." They are not irrelevant, but they are in fact the very considerations which must be viewed to determine indispensability in this case. Those factors as discussed in Utah's earlier brief show that there is a critical need and an intense public interest in having some adjudication in this proceeding, the absence of any other forum, the complexity of the litigation if all of the private claimants were to be brought in, and the possibility of shaping relief so as to protect the interests of Morton and the other absent private claimants. These considerations are appropriately within the scope of Rule 19 (b), are in accord with the recent pronouncement of this court in *Provident*, and are the very matters emphasized by Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327 (1957). Those practical factors need not be discussed any further here, because they are treated adequately in Utah's brief of January 25, 1968.

POINT II. IF MORTON AND THE OTHER PRIVATE CLAIMANTS ARE FOUND TO BE INDISPENSABLE, THEN:

A. TO THE EXTENT THAT PRIVATE CLAIMANTS SEEK TO CLAIM AGAINST THE STATE OF UTAH:

1. UTAH HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

This point also is adequately covered in Utah's brief of January 25, 1968, with the exception of two observations that have since been raised by the reply briefs of Morton and the United States.

The first has to do with express consent to suit, since Morton has cited Section 78-11-9, Utah Code Annotated (1953) as express consent by Utah to suit by Morton in this action. Whatever effect that statute might have had, it has since been repealed. Section 78-11-9 provided as follows:

> Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. It shall be the duty of the

> attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof.

In 1965 the Utah Legislature enacted a general governmental immunity act encompassing claims arising from contracts, real and personal property, and torts. Prior to that time Utah had enacted a number of statutes providing for limited waiver of governmental immunity in certain areas, but all of these provisions were repealed July 1, 1966 when the Utah Governmental Immunity Act took effect. That legislation was enacted as Chapter 139, Laws of Utah 1965, and has been codified as Chapter 30, Title 63, Utah Code Annotated (1953, as amended). Section 6 of that act (63-30-6) specifically covered exactly the same claims as former Section 78-11-9. Section 6 reads as follows:

> Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

Then, Section 16 vested exclusive original jurisdiction of all claims brought under the act in the state courts of Utah:

> The district courts shall have exclusive original jurisdiction over any action brought under this

> act and such actions shall be governed by the Utah rules of civil procedure insofar as they are consistent with this act.

And Section 36 provided that:

> All other acts or statutes in conflict with provisions of this act are repealed as of the effective date of this act.

Even without the express repeal, it is clear that the comprehensive governmental immunity act would effectively repeal by implication all prior statutes inconsistent therewith. For example, the rule of implied repeal is well summarized in 50 *Am. Jur.*, Statutes, Section 556:

> Repeal by Implication — As a general rule, the enactment of revisions and codes manifestly designed to embrace an entire subject of legislation, operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. Under this rule all parts and provisions of the former act or acts, that are omitted from the revised act, are repealed, even though the omission may have been the result of inadvertence. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new even though there is no repugnancy between them.

In support of the above rule of repeal by implication, see *United States v. Ranlett*, 172 U.S. 133 (1898); *United States v. Allen*, 163 U.S. 499 (1896); *Kohlsaat v. Murphy*, 96 U.S. 153 (1877); *Stewart v. Kahn*, 11 Wall. 493 (1870).

The second observation has to do with implied consent to suit when a sovereign is the plaintiff. The United States has cited *United States v. Thekla*, 266 U.S. 328 (1924) in support of its position that both Utah and the United States have impliedly consented to suit by private parties in this action. The *Thekla* case was an admiralty matter, has no bearing on the case at bar, and this Court refused to apply the implied consent theory of *Thekla* to civil actions. An article ably discussing the general problem at hand is *Federal Civil Procedure and Sovereign Immunity*, 48 Cal. L. Rev. 323 (1960), wherein those cases which have suggested implied waiver were criticized:

> Basically, the *Thekla* admiralty rule is that when the United States institutes the suit it impliedly waives its immunity and hence permits an affirmative recovery by way of counter-claim against the sovereign on a claim that grows out of the subject matter of the suit. Since the rule permits affirmative recovery independent of statutory authority, it was seized upon and applied by analogy to civil suits. However, the Supreme Court in *United States v. Shaw* [309 U.S. 495 (1940)] clearly rejected any such extension and specifically limited the *Thekla* decision to claims for collision in admiralty. Notwithstanding this definitive holding restricting the rule, courts have occasionally attempted to circumvent the limitation. Such attempts have met with conspicuous failure.
>
> It seems clear then that any reliance upon the admiralty cases in civil suits as authority for an implied-waiver theory is manifestly in error. (at page 330)

See also, *United States v. Finn*, 239 F.2d 679 (9th Cir. 1956), where the Court of Appeals correctly rejected the admiralty rule of *Thekla* as inapplicable to civil suits.

2. IF PRIVATE CLAIMANTS ARE CITIZENS OF STATES OTHER THAN UTAH, CONGRESS HAS NOT IMPLEMENTED JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

Despite the Eleventh Amendment, there might be judicial power in the federal courts for controversies "between a State and Citizens of another State." But it is clear that Congress must implement by statute the exercise of such judicial power, and since 1948 there has been no implementing legislation. Since Morton is not a citizen of Utah, the claim against Utah cannot be maintained.

The very first federal judiciary act was enacted September 24, 1789 (1 Stat. 73), and provided in Section 13 thereof:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also *between a state and citizens of other states*, or aliens, in which latter case it shall have original but no exclusive jurisdiction. (emphasis added)

The essence of that statute continued in effect, despite a number of subsequent amendments, until June 25, 1948, when it was amended to prevent suits

against a state by citizens of other states, but to continue to allow suits by states against citizens of other states. The pertinent part of that act, 62 Stat. 927, 928, provides in Section 1251 (b) (3) that:

> The Supreme Court shall have original but not exclusive jurisdiction of . . . all actions or proceedings *by a State against the citizens of another State* or against aliens. (emphasis added)

This provision is codified as part of 28 U.S.C., Section 1251. The *Historical and Revision Notes* following Section 1251 of Title 28, U.S.C.A., provides at page 2:

> Sections 341 and 371 of Title 28, U.S.C. 1940 ed., were not wholly consistent with such constitutional provisions. Said section 341 provided that the Supreme Court shall have original jurisdiction of controversies *between a State and citizens of other States* or aliens, *whereas the 11th Amendment prohibits an action in any Federal court against a State* by citizens of another State or aliens. (emphasis added)

Whatever the merit, or lack of merit, of the above observation that the amendment made the statute consistent with the constitutional provisions, the important fact is that Congress did amend the statute to eliminate suits *against* states by citizens of other states, while retaining jurisdiction for actions brought by states against citizens of other states. Congress has often revised the extent to which the federal judicial power shall be exercised by the federal courts. For example, when cases arise under the Constitution, laws or treaties of the United States, or when cases are between citizens of different states, the judicial power cannot be exer-

cised unless the amount in controversy exceeds $10,000.00 (28 U.S.C. 1331, 1332).

Thus, there is no statutory implementation of judicial power in original actions for suits *against* a state by citizens of another state, and this Court cannot entertain the claim which Morton seeks to assert against Utah.

3. IF PRIVATE CLAIMANTS ARE CITIZENS OF UTAH, THERE IS NO JURISDICTION FOR SUCH CLAIMS TO BE HEARD IN AN ORIGINAL ACTION.

While the United States admits at page 11 of its memorandum that it does "not understand the rationale" of the California case, it seems to be suggested by the United States that the jurisdiction determination expressed by that case is a judicially created rule which may or may not be applied, depending on the discretion of the Court.

This is a basic misconception. The holding of the *California* case was very fundamental. The United States Constitution does not grant judicial power to the federal courts to entertain suits between a state and its citizens, except when a question arises under the Constitution, laws or treaties of the United States. As to those cases, the jurisdiction of the United States Supreme Court is appellate only. Thus, neither can Congress provide for, nor can the Supreme Court elect to take, original jurisdiction in cases between a state and its citizens. Such jurisdiction could only be created by an amendment to the federal Constitution.

There should be no mystery as to the reason why no judicial power is conferred on federal courts in actions between a state and its own citizens. The cases cited hereafter make it very clear that the framers of the Constitution thought that the state courts should be adequate to handle such cases, and there was no need for federal judicial power. The Court has also made it abundantly clear that in original actions the case will be limited to the *named parties* in the grant of jurisdiction, and to the named parties *only*. To bring in other parties, either where there is no judicial power, or where there is judicial power but jurisdiction is appellate, would circumvent and frustrate the constitutional limitations on original jurisdiction.

The absence of jurisdiction in original actions between a State and its own citizens was not an innovation of the Court in *California v. Southern Pacific*. A clear recognition and lucid explanation of this particular jurisdictional limitation was made by the Court as early as 1821 in *Cohens v. Virginia, infra*. Utah initially pointed to the *California* case only because of its similarity to the case at bar with respect to jurisdictional limitations, not to suggest that the Court was there for the first time recognizing those jurisdictional limitations. In Utah's printed brief on file with the Court, the basis of the particular jurisdictional limitation under discussion was explained and cases were cited without elaboration. It now appears that some elaboration is necessary.

Article III, Section 2, United States Constitution, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Supreme Court has construed the foregoing language in a great number of cases, and from them the following basic principles can fairly be summarized.

> I. The measure, limit and extent of the judicial power of the Courts of the United States is the grant contained in Article III, Section 2, United States Constitution, as quoted above.
>
> II. Paragraph 1 of Section 2 *confers* the judicial power, and paragraph 2 *distributes* the judicial power between appellate and original jurisdiction in the United States Supreme Court. The original jurisdiction distributed in paragraph 2 includes *only* those cases where judicial power is conferred by paragraph 1, and the appellate

jurisdiction, distributed in paragraph 2, is likewise limited to those cases where judicial power is conferred by paragraph 1.

III. The *grant of judicial power* and the *distribution of jurisdiction* include the following cases only (omitting references to ambassadors, public ministers, consuls, admiralty and maritime jurisdiction):

A. Original Jurisdiction in Supreme Court:

1. Cases between two or more states;

2. Cases between a state and citizens of another state;

3. Cases between a state and foreign states, citizens or subjects.

B. Appellate Jurisdiction in Supreme Court:

1. Cases requiring judicial construction of the United States Constitution or a federal statute or treaty (this is the so-called "federal question" jurisdiction);

2. Cases where the United States is a Party;

2. Cases between citizens of different states (this is the so-called "diversity" jurisdiction);

4. Cases between citizens of the same state claiming lands under separate grants of different states;

5. Cases between the citizens of a state and foreign states, citizens or subjects.

IV. The constitutional grant of judicial power bases jurisdiction upon either the *character of the parties* to the action or the *character of the subject matter* of the action. *All* original jurisdiction cases (itemized under III A above) are

dependent upon the character of the state as a party, and such jurisdiction exists between the named parties *only*. Appellate jurisdiction is also dependent upon the character of the parties in all cases, except (1) "federal question" (required construction of federal constitution, treaty or statute) cases, and (2) land title disputes between citizens of the same state (this is essentially a subject matter category, although it operates in practical effect as an exception to "diversity" jurisdiction—the latter jurisdiction being dependent upon the character of the parties rather than upon the subject matter.)

V. Where jurisdiction is based on the character of the parties, it is entirely unimportant what the subject matter may be—the subject matter is wholly irrelevant to jurisdiction. Where jurisdiction is based on the character of the subject matter of the case, it is totally immaterial who the parties are. (If the United States or a state should be a party, there might be an additional jurisdictional question with respect to consent to suit. But that is an entirely different question which has no bearing on the present question of a constitutional grant of jurisdiction.)

VI. The original jurisdiction of the Supreme Court is not exclusive by virtue of the Constitution, and Congress is empowered to confer concurrent original jurisdiction on inferior federal courts.

VII. There is jurisdiction in an original action for suits between the United States and a state.

Original action jurisdiction is implemented by 28 U.S.C. § 1251, which provides as follows:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

With this preliminary background, attention will now be given to the judicial decisions of the United States Supreme Court.

Shortly after the United States Constitution was adopted, the Court was called on to decide *Chisholm v. Georgia,* 2 Dallas 419 (1793), in which it was held that the State of Georgia could be sued on a debt by an individual citizen of another state, and that the State of Georgia would be amenable to suit without respect to whether it consented to such suit. Since § 2 of Article III granted judicial power in cases "between a State and Citizens of another State," it appeared to a majority of the Court that there was a clear grant of judicial power for the action, and that by accepting and ratifying the Constitution, the states, at least impliedly, con-

sented to suit where specific judicial power was conferred on the United States courts.

The decision in *Chisholm v. Georgia, supra,* created such a wave of angry protest among the citizenry that at the very next session of Congress, steps were taken to promulgate what was to become the Eleventh Amendment to the United States Constitution, and which was intended, in effect, to render null and void the opinion of the Supreme Court to prevent suits such as that sustained in *Chisholm v. Georgia.*

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (Declared ratified January 8, 1798.)

Following the adoption of the Eleventh Amendment, the next significant case dealing with the original jurisdiction of the United States Supreme Court was *Marbury v. Madison,* 1 Cranch 137 (1803), wherein it was stated:

> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall

be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the word be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause in-

> operative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

The Court thus explained that the jurisdiction of the United States Supreme Court was carefully defined and limited in the grant of judicial power by the Constitution, and that the extent to which the court could exercise such judicial power in an original action was strictly limited by the distribution clause, and that said clause prevented the court from exercising jurisdiction to issue a writ of mandamus to the Secretary of State of the United States.

Eighteen years later, the court decided *Cohens v. Virginia*, 6 Wheat. 264 (1821), wherein Mr. Chief Justice Marshall discussed at great length the original and appellate jurisdiction of the United States Supreme Court. While the case, including the syllabus, is approximately 200 pages in length, the most pertinent language to the issue at hand appears at pages 378, 390-394. Though the quotes are rather lengthy, the language is so fundamental to a proper understanding of the present issue, and is so explanatory as to the rationale for the rule, that it is advisable to set forth the Court's explanation:

> The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?
>
> The second question of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on

the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," . . . "and between a State and foreign States, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union. (at page 378)

* * *

It has been also urged, as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal Courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this Court could not establish the

demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in it constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?

After the bestowing on this subject the most attentive consideration, the Court can perceive

no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arisng under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each

other. We must endeavour so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely neces-

sary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending, that the legislature may "apportion the judicial power between the Supreme and inferior Courts according to its will." That would be, as was said by this Court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other subjects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a State is a party, the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate

> in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court.

As observed by the Court in the *Cohens* case, Article III of the United States Constitution does not contemplate cases between a state and one of its own citizens if jurisdiction is dependent upon the character of the parties, but if jurisdiction is founded on the subject matter of the case (in that a federal constitutional, statutory or treaty provision is involved), then it is entirely immaterial who the parties are, and jurisdiction will exist even though the case may be one between a state and its own citizens. In the latter situation, where jurisdiction would exist by virtue of the subject matter, the Supreme Court would have appellate jurisdiction only. Mr. Justice Marshall concluded that the states, by ratifying and accepting the Constitution, had impliedly consented to such suits (if consent was necessary at all). It was further observed that the primary reason why there was no grant of jurisdiction as to the character of the parties between a state and its own citizens was because a citizen reasonably could expect a fair and impartial judicial proceeding in his own state. But if it became necessary for a citizen of one state to bring suit against another state, it was less likely that the private citizen of the sister state could expect the same impartiality in the courts of the state being sued as he might expect in the courts of his own state. Consequently, as between a state and a citizen of another

state, there was a direct grant of jurisdiction to the federal courts; whereas, as between a state and one of its own citizens, there was no grant at all of jurisdiction to the federal courts.

The observations of the Court in the *Cohens* case were made in light of the *Chisholm* decision and the adoption of the Eleventh Amendment. Then, in 1824, the court decided *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824). It was there held that while a state could not be sued by the United States to prevent the state from collecting an unconstitutional tax on the United States Bank (because of the prohibition of the Eleventh Amendment), the action could be maintained against the officers of the state to prevent the execution of the laws providing for the illegal tax levy. This holding has since been modified to the extent that now a suit in form against governmental officials but in substance against the sovereign will be viewed as a suit directly against the sovereign. See, for example, *Minnesota v. Hitchcock* and *New Mexico v. Lane*, *infra*.

Thirty years later, in *Florida v. Georgia*, 17 How. 478 (1854), the Court considered a boundary dispute between the named states. The United States Attorney General sought to intervene to represent the interests of the United States and the interest of all of the other states of the United States in a proper boundary line determination which would protect the interests of the United States. Since the action was initially filed as an original proceeding in the United States Supreme Court, jurisdiction was properly based upon the character of the parties, since they were both states. But when

the United States sought to intervene, there was no provision in the distribution clause for original actions which included the United States as a party. Such suits had to be commenced in the lower federal courts and reach the United States Supreme Court only through the exercise of its appellate jurisdiction.

Fearful that the Court would be ousted of jurisdiction if the United States were allowed to intervene as a party, the Court simply permitted the United States Attorney General to appear as *amicus curiae* to represent the interests of the United States, on the rationale that such a positon would not make the United States a party of record and would not oust the Court of jurisdiction.

Justice Curtis, dissenting, reasoned that the United States in substance was a party even though in form appeared as *amicus curiae* and, therefore, the United States should be viewed as an actual party and the jurisdiction of the Court would, therefore, be ousted. Justice Curtis further argued that all cases involving states (where jurisdiction was founded on the character of the parties) had to be original actions and all cases in which the United States was a party had to be appellate actions—and that this was specifically intended so that the United States and a state could never sue each other. Since they were both sovereigns, Justice Curtis thought it inconceivable that they should bring suit against each other and believed that the Constitution had intended to prevent this. This is to say that if every case in which the United States is a party must be filed in the lower federal courts, and every case in which a state is a party must be filed in an original action in the

United States Supreme Court, there could never be jurisdiction in any court to entertain such a suit between the two sovereigns. The following quote from the dissenting opinion is useful, not only because the majority opinion is silent as to the issue, but because of the subsequent impact of *United States v. Texas, infra.*

> The judicial power of the United States, extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.
>
> In distributing this jurisdiction, the constitution has provided that, in all cases in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.
>
> I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.
>
> * * *
>
> The decision of this court, in Marbury v. Madison, 1 Cranch, 137, settled this construction of

the constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says: "in all cases in which a State shall be a party, the supreme court shall have original jurisdiction," it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, *is confined to the cases in which are those enumerated parties, and those only.* (emphasis added)

It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

* * *

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an inhabitant of this district who is not competent to sue or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the constitution and the 11th section of the judiciary act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do

> nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in Hagan v. Walker, 14 How. 36, and the earlier cases lead to the same conclusion. Russell *v.* Clarke's Ex'rs, 7 Cr. 98; Cameron *v.* Roberts, 3 Wheat. 591; Wormley *v.* Wormley, 8 ibid, 451; Carneal *v.* Banks, 10 ibid, 188; West *v.* Randall, 2 Mason, 195, 196; Shields *et al. v.* Barrow, *ante*, p. 130, of the present term.

In *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553 (1870), it was held that a state was empowered to bring an original suit in the United States Supreme Court as a moving party against a citizen of another state, but it could not include within such action citizens of its own state. While the rationale was somewhat lacking in clarity, the holding obviously was predicated on the plain fact that there was no jurisdiction to entertain an original action between a state and its own citizens.

In 1875, the Court decided *Florida v. Anderson*, 91 U.S. 667 (1875), wherein it was held that Florida could commence an original action in the United States Supreme Court against citizens of Georgia, and could further name as a *formal* party-defendant the United States Marshal for the Northern District of Florida, who was a resident of Florida and who had in his possession an execution. It was made clear, however, that if the citizen of Florida had been a real party in interest, rather than merely a formal party, the jurisdiction of the Court would have been destroyed by the act of the state joining as a real defendant one of its own citizens.

In *Ames v. Kansas*, 111 U.S. 449 (1884), the Court reviewed at some length earlier decisions relating to original jurisdiction, and concluded that Congress was empowered to vest inferior federal courts with concurrent original jurisdiction.

The next decision of consequence to the issue under discussion was *Hans v. Louisiana*, 134 U.S. 1 (1889), wherein the Court modified part of the dictum in *Cohens v. Virginia*, *supra*, by holding that a state could not be sued without its consent by one of its own citizens even when jurisdiction was based on the *subject matter* of the action. This was not an *original* action. The Court reviewed the history of the impact of the *Chisholm v. Georgia* decision and the manner in which it precipitated the passage of the Eleventh Amendment, concluding that since the people had so clearly manifested their feeling that a state should not be subjected to suit by a citizen of another state in the federal courts without the consent of the state thus being sued, it must be equally clear that a state could not be sued by its own citizens in a federal court without its consent.

The Court was careful to make clear that the jurisdiction which existed for a citizen to sue his own state with its consent was by virtue of the *subject matter* of the suit and not by virtue of the character of the state as a party. The latter jurisdictional consideration is entirely different from the immunity of a state to suit until it has expressly so consented. The *Hans* decision seemed to effectively change the *Cohens* doctrine that states impliedly consent to suits by their own citizens by adopting the Constitution, when jurisdiction is

founded on the subject matter of the suit. Pertinent extracts from the *Hans* opinion are quoted below:

> The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that *arises under the Constitution or laws of the United States.* (emphasis added)
>
> The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, *without regard to the character of the parties,* if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitutoin, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." *It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties,*

a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens. (emphasis added)

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v .Jumel,* 107 U.S. 711; *Hagood v .Southern,* 117 U.S. 52; *In re Ayers,* 123 U.S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the State themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the

amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia,* 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall *not be construed to extend to* any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state." The Supreme Court has construed the judicial power as extend-

ing to such a suit,and its decision was thus overruled. . . .

* * *

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The latter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a constructon never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens *in cases arising under the Constitution or laws of the United States*: can we imagine that it would have been adopted by the State? The supposition that it would is almost an absurdity on its face. (emphasis added)

* * *

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United

States. He also showed that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. "Where," said the Chief Justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far reexamined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the

United States, and, therefore, not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign state," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, than an action does not lie against the sovereign.

It must be remembered that the *Hans* opinion was concerned with a case arising "under the Constitution, laws or treaties of the United States." As such, jurisdiction was founded on the *subject matter* of the case—not on the character of the parties. Necessarily then,

the case originated in the lower federal court and reached the Supreme Court on appeal. Jurisdiction thus existed for a citizen to sue his own state in a *subject matter* case, but such jurisdiction could not be exercised until the state consented to the suit. The important thing to remember is that if jurisdiction would have been based on the character of the parties, the case would have had to come within the original jurisdiction of the Supreme Court—and there would have been no jurisdiction for such a suit between a state and one of its own citizens. It would not have been a question of consent or lack of consent—it would simply have been a lack of jurisdiction, irrespective of consent. Thus, speaking of the constitutional grant of judicial power, the Court in *Hans* said:

> It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a state and its own citizens is not embraced within it; . . .

The United States Supreme Court next decided *United States v. Texas,* 143 U.S. 621 (1892), wherein it was held for the first time that the United States could bring an original action against a state for the determination of boundary lines with respect to disputed territory. In so doing, the Court justified jurisdiction by an interesting combination of constitutional provisions. The Court first concluded that the *distribution* of jurisdiction was founded on the character of the parties so as to permit the exercise of *original* jurisdiction (basing this conclusion upon the fact that a state was a party in its character as a state). The Court next concluded that the *grant* of jurisdiction

was by virtue of the fact that the United States was a party. While the jurisdiction of the Supreme Court ordinarily would be *appellate* by virtue of such *grant* of judicial power, the presence of Texas as a state justified the original action. Two justices dissented, being of the opinion that the original jurisdiction of the court could not be so exercised. The pertinent part of the majority opinion, as well as the dissenting opinion, is quoted below:

> * * * The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitutoin. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the

United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the state tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U.S. 211. This was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The constitution extends the judicial power of the United States to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different states; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Art. 3 § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of the controversy. *Cohens v. Virginia,* 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, there-

fore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

* * *

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a

> State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.
>
> The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.
>
> We are of the opinion, therefore, that this case is not within the original jurisdiction of the court.

The Court in *United States* v. *Texas* was thus faced with two dilemmas. The first related to jurisdiction, for the Constitution said that in all cases involving the United States as a party, the Supreme Court had appellate jurisdiction only, and in all cases involving a state as a party, the jurisdiction was and had to be original. Literally applied, these provisions would make it impossible for the United States and a state ever to join in the same action in a federal court. The second dilemma was a practical one. If no federal jurisdiction existed, it was thought that the only resolution of the boundary dispute between Texas and the United States would be by suit in the state courts of Texas, by treaty, or by war. The practical dilemma was easily solved—by finding jurisdiction in the *original* action. But the dilemma of jurisdiction was not so easily solved. The Court was seemingly compelled to an illogical conclusion: It found the *grant* of jurisdiction to exist by virtue of the character of the United States as a party, and it then found *original* jurisdiction by virtue of the character of the State of Texas as a

party. If the distribution of jurisdiction is to be relied upon, it is then necessary to find the *grant*. Nothing more is distributed than granted. The dissent seemed to reason that, since there was no *grant* of jurisdiction for suits between the United States and a state, there could be no *distribution* of such jurisdiction; and, since the only applicable grant of jurisdiction related to the character of the United States as a party—as relied upon by the majority of the Court—it was necessary to trace the grant from the grant clause to the distribution clause to determine whether the exercise of such jurisdiction was to be original or appellate. The dissenting justices concluded that such jurisdiction was clearly appellate and not original.

It is noteworthy that since a federal question existed as to the interpretation of a treaty of the United States, jurisdiction could have been founded on the subject matter of the action, and the character of the parties would have been immaterial. Of course, the case would then have to originate in the lower federal courts and reach the United States Supreme Court on appeal.

Be that as it may, the law is now clearly settled that the original jurisdiction of the Supreme Court encompasses suits between a state and the United States. The foregoing quotes and analysis have been included because they are useful to illustrate the Court's struggle with jurisdictional questions concerning the character of the parties (and since the case at bar is between a state and the United States).

In *California* v. *Southern Pacific Company*, 157 U.S. 229 (1895), the next significant case decided, the

State of California brought suit against a corporate citizen of another state to quiet title to certain water front lands in the vicinty of Oakland city. It appeared that the City of Oakland and the Oakland Water Front Company, both citizens of the State of California, had or claimed to have interests in the real property subject to the litigation, and the interests of such entities would be concluded, as a practical matter, by any decision or decree of the Court. The Supreme Court found the City of Oakland and the Oakland Water Front Company to be indispensable parties, and concluded that the case could not be determined effectively without their presence. But the Court then noted that to include such citizens of California as parties would destroy jurisdiction in an original action, carefully pointing out the distinction between jurisdiction founded on the character of the parties and jurisdiction founded on the subject matter of the action.

While some claim was made by the parties that federal questions were present in that the federal constitution would have to be construed and applied to determine the constitutionality of certain state laws, the Court correctly observed that jurisdiction was founded on the *character of the parties* when the original suit was commenced, and that such jurisdiction must fail if citizens of California were to be joined as parties. This was so because, if jurisdiction had been based on a federal question rather than on the character of the parties, such jurisdiction would then have been appellate only, and the original jurisdiction of the Court still would have been defeated. Because of the similarity of that case to the instant case, rather lengthy excerpts

are quoted below from the main, concurring and dissenting opinions:

> This brings us to consider what the effect would be if the Oakland Water Front Company and the city of Oakland were made parties defendant. The case would then be between the State of California on the one hand and a citizen of another State and citizens of California on the other. Could this court exercise original jurisdiction under such circumstances?
>
> By the first paragraph of section two of article III of the Constitution it is provided that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; . . . to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States . . ." And by the second clause that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction . . ." The language, "in all cases in which a State shall be party," means in all the cases above enumerated in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those *enumerated parties and those*

only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing. *Cohens v. Virginia*, 6 Wheat. 264, 393. (emphasis added)

We are aware of no case in which this court has announced the conclusion that power is conferred on Congress to authorize suits against citizens of other States joined with citizens of the same State as that of which plaintiff is a citizen to be originally commenced in, or to be removed to, the Circuit Courts, as arising under the Constitution on the ground indicated, where there is no separable controversy or the citizens of plaintiff's State are indispensable parties, *but we are not called on to consider that question, or whether any Federal question is involved*, since the original jurisdiction of this court in cases between a State and citizens of another State rests *upon the character of the parties and not at all upon the nature of the case*. (emphasis added)

If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States. (emphasis added)

It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court, *Marbury v. Madison*, 1 Cranch, 137, 173, 174, and no attempt to do so is suggested here. The jurisdiction is limited

and manifestly intended to be sparingly exercised, and should not be expanded by construction. *What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.* (emphasis added) *Bill dismissed.*

MR. JUSTICE FIELD concurring. It is greatly to be regretted that the controversies between the State of California, the Southern Pacific Railway Company, and the city of Oakland cannot now, in view of the limited character of the original jurisdiction of the Supreme Court of the United States, be heard, determined, and settled by this court, for those controversies will be a fruitful source of disturbance and vexation to the interests of the State until they are thus determined and settled. But, from the views of the court expressed in its recent decision, proceedings for such determination and settlement must find their commencement in the courts of the State, and can only reach this court from their decision upon appeal or writ of error. And the sooner proceedings are taken to reach that disposition of the controversies the earlier will be their final settlement.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BREWER, dissenting.

In my judgment it is competent for the court, in the exercise of its original jurisdiction, to pro-

ceed to a final decree in this cause that will determine the present controversy between the State of California and the Southern Pacific Company.

By the second section of the third article of the Constitution it is declared that the judicial power of the United States shall extend "to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects." And it is provided in the same section that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is beyond dispute that the case before us presents a controversy between the State of California and a corporation created under the laws of the Commonwealth of Kentucky, and therefore, a controversy between a State and a citizen of another State. And as the judicial power of the United States extends to such a controversy, and as this court is invested with original jurisdiction "in *all* cases," to which the judicial power of the United States extends, in which a

> State is a party, I do not see how we can escape the obligation imposed by the Constitution, to hear this cause upon its merits, and pass such decree as will determine at least the matters in dispute between California and this Kentucky corporation.

In *Minnesota v. Hitchcock,* 185 U.S. 373 (1902), the State of Minnesota, claiming title, filed an original action to enjoin the Secretary of Interior and the Commissioner of the General Land Office from selling certain lands included within an Indian reservation. No party contested jurisdiction, but jurisdiction purportedly was founded on the character of the parties in that the Secretary of the Interior and the Commissioner of the General Land Office were citizens of states other than Minnesota, and so the action assumed the complexion of a state bringing suit as a moving party against citizens of another state. The Supreme Court raised the question of jurisdiction on its own initiative, and rejected the argument that jurisdiction was so founded, pointing out that the United States was in substance the real defendant and that the action was by a state against the United States. But the Court concluded that the United States may be sued *with its consent* and that a state may file such an action against the United States as an original action, relying essentially on the decision in *United States v. Texas,* 143 U.S. 621, *supra.* The relevant part of the *Minnesota v. Hitchcock* decision is quoted below:

> A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does

not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. *It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter.* The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original and not of the appellate jurisdiction. The pertinent constitutional provisions are found in section 2 of article III, as follows: (emphasis added)

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact,

with such exceptions and under such regulations as the Congress shall make."

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a State shall be a party." This paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the first paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the State of Minnesota is a party to this litigation. It must also appear that the case is one to which by the first paragraph the judical power of the United States extends. There are three clauses in the first paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a State and citizens of another State;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party."

* * *

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or

> defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.
>
> The case of *United Staies v. Texas,* 143 U.S. 621, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the State of Texas to determine the title to a tract, called the county of Greer, which was claimed by the State to be within its limits and a part of its territory, and by the United States to be outside the State of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained.

Also in 1902, the Court decided *Minnesota v. Northern Securities Company,* 184 U.S. 199 (1902), wherein it was held that even though jurisdiction was properly founded in the first instance between the state and a citizen of another state, there were indispensable parties who were citizens of the State of Minnesota. The Court would be ousted of jurisdiction by bringing such parties into the action, since then the state would be claiming against some of its own citizens in an original action. The suit had to be dismissed. The pertinent part of the opinion is quoted below, although the Court does not elaborate at any length on the rationale for the ruling on jurisdiction:

> The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the State of Minnesota, *the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that State,* and the Northern Securities Company, a corporation of the State of New

Jersey, and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies. (emphasis added)

* * *

Upon investigation it might turn out that the allegations of the bill are well founded, and that the State is entitled to relief: or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the State, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is *Denied.*

In *New Mexico v. Lane*, 243 U.S. 52 (1917), the State of New Mexico filed suit against the Secretary of Interior and the Commissioner of the General Land Office to enjoin an issuance of a proposed patent by the United States. The suit, in effect, was by the State of New Mexico against the United States and is very similar to the case just discussed of *Minnesota v. Hitchcock, supra.* But in the *New Mexico* case, the person to whom the patent would issue and who had made an entry and paid the purchase price for the land in question was a citizen of the State of New Mexico. Although he had not been made a party to the action, the Court concluded that he was an indispensable party and that the suit could not proceed without his presence. But to permit a citizen of New Mexico to be brought in as a party in a position contrary to that asserted by the State of New Mexico would destroy the jurisdiction of the Court, because jurisdiction was based on the *character* of the parties. Since original jurisdiction would not exist if the entryman were to be included, the case was, therefore, dismissed, citing as authority *California v. Southern Pacific Company, supra.* The concluding paragraph of the *New Mexico* case is quoted below, because, while no rationale is expressed, the conclusion is clear:

> It would seem, besides, that under the averments of the bill Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendant that he is, complainant does not deny. *California v. Southern Pacific Co.*, 157 U.S. 229.
>
> ***Dismissed.***

In *Duhne v. New Jersey*, 251 U.S. 311 (1920), a citizen of New Jersey sought to file an original action against the State of New Jersey and others. The Court rejected the filing of the complaint, making the general observation that the original jurisdiction of the court did not encompass a suit brought by a citizen against his own state *without its consent*. The Court cited as authority *California v. Southern Pacific* and some of the other cases discussed above, but its observation was confusing with respect to lack of consent. Consent has nothing to do with the judicial power of the Court in an original action involving a state and its own citizens. There is no such jurisdiction, irrespective of consent. The Court could have better clarified its holding by separating the two issues, and pointing out that New Jersey had not consented to the suit, and, even if it had, there would be no original jurisdiction between a state and one of its own citizens. Nevertheless, since the case is relevant to the present issue, the memorandum opinion is quoted below:

> Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.
>
> The complainant, a citizen of New Jersey, asked leave to file an original bill against the Attorney General of the United States, the Commissioner of Internal Revenue thereof and the United States District Attorney for the District of New Jersey, as well as the State of New Jersey. The bill sought an injunction restraining the United States officials named and the State of New Jersey, its officers and agents, from in any manner directly or indirectly enforcing the Eighteenth Amendment to the Constitution of the United States, any law of Congress or statute

of the State to the contrary, on the ground that that Amendment was void from the beginning and formed no part of the Constitution.

Answering a rule to show cause why leave to file the bill should not be granted, if any there was, the defendants, including the State of New Jersey, denied the existence of jurisdiction to entertain the cause and this is the first question for consideration.

So far as the controversy concerns the officials of the United States, is is obvious that the bill presents no question within the original jurisdiction of this court and in effect that is not disputed since in substance it is conceded that the bill would not present a case within our original jurisdiction if it were not for the presence of the State of New Jersey as a defendant. But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent. *Hans v. Louisiana*, 134 U.S. 1; *North Carolina v. Temple*, 134 U.S. 22; *California v. Southern Pacific Co.*, 157 U.S. 229; *Fitts v. McGhee*, 172 U.S. 516, 524.

It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of § 2, Article III, of the Constitution, confers original jurisdiction upon this court "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." In other words, the argument is that the effect of the clause referred to is to divest every State of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as crea-

tive of jurisdiction instead of confining it to the rule long since announced as follows: "This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only." *Louisiana v. Texas*, 176 U.S. 1, 16. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a State without its consent, *the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred.* (emphasis added)

As the want of jurisdiction to entertain the bill clearly results, it follows that the permission to file must be and it is denied and our order is,

Rule discharged.

In *Texas v. Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1921), it was held, on the authority of *California v. Southern Pacific Company* and *Minnesota v. Northern Securities Company, supra*, that certain citizens of the State of Texas were indispensable parties and had not been joined in the original action, but to so join them would defeat the jurisdiction of the court. The complaint was, there-

fore, dismissed. The conclusion of that opinion is quoted below:

> * * * They [certain absent persons deemed indispensable] are not parties to the bill, and as to all but one the bill makes it clear that their citizenship is an obstacle to making them such. This, without more, would preclude us from awarding any relief on this portion of the bill. *California v. Southern Pacific Co., supra; Minnesota v. Northern Securities Co., supra.*

The most recent case touching on the precise question under discussion is *Louisiana v. Cummins*, 314 U.S. 577 (1941), which is a *per curiam* decision, issued as follows:

> Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana. *California v. Southern Pacific Co.*, 157 U.S. 229, 256-262; *Minnesota v. Northern Securities Co.*, 184 U.S. 199, 238; *New Mexico v. Lane*, 243 U.S. 52, 58; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 163. The rule to show cause is discharged.

The cases cited above and the accompanying explanations and interpretations are believed accurately to set forth the constitutional basis for the limitation on original actions in the United States Supreme Court which prevents citizens of a state claiming against their own state, or vice versa. That principle has been recognized and applied by every decision of the United States Suupreme Court where the issue has been raised.

The primary difficulty experienced by the United States in its memorandum appears to stem from its failure to recognize that there is no grant of jurisdiction

to the federal judiciary for suits between a state and its own citizens when jurisdiction is dependent on the character of the parties. The failure to recognize this basic principle leads to considerable confusion in failing to distinguish properly between original and appellate jurisdiction and in failing to appreciate the further jurisdictional significance of subject matter cases and character of the parties cases.

Thus, on pages 9-11 of its memorandum, the United States cites *California v. Southern Pacific Company*, *Minnesota v. Northern Securities Company*, and *Louisiana v. Cummins* (all cited and discussed, *supra*, in this memorandum), contending that in these cases only "local law issues" were involved and there was "no federal question." That observation is really quite meaningless, since in each case jurisdiction was founded on the character of the parties (as indeed it had to be to sustain *original* jurisdiction). That being the case, the subject matter was entirely immaterial—whether issues of local law or otherwise.

Another observation made by the United States (at page 9) was that perhaps in cases between a state and citizens of another state, there must be "complete diversity," and to include citizens of the state would destroy diversity—and thus destroy jurisdiction. This observation is not too far afield but is incorrectly characterized. It is true that in certain instances diversity of citizenship is a constitutional requirement, and if diversity is destroyed, jurisdiction is destroyed. Somewhat similar is the present case, where to include citizens of Utah would be to create an action not comprehended by the Constitution — and thus beyond the original

jurisdiction of the Court. If the question were really a "diversity" question, the Court would have so classified it, and it has not.

The final argument suggested by the United States (at page 11) is that even if original jurisdiction "of a *federal question case* to which a state is a party is defeated by joinder of citizens of that state as adverse parties, . . . an independent ground of federal jurisdiction is the presence of the United States as a party, . . ." This argument is pregnant with misconceptions and contradictions. In the first place, there are *no* "federal question" cases which are cognizable as original actions—all original actions are and must be based on the character of the parties. In the second place, where jurisdiction is dependent upon the United States as a party (the suggested "independent ground"), such jurisdiction is appellate only, and cannot be exercised in an original action. Even in *United States v. Texas*, *supra*, and cited by the United States, the Court suggested no such result.

On the contrary, the Court had to ride both Texas and the United States Roman style, depending on the United States for a grant of judicial power and depending on Texas for original jurisdiction. Both horses were necessary. Without the Texas footing, the case would have fallen from the original action forum; and without the United States footing, the Court would have been without any judicial power. This is explained at greater length in the excerpts from that case, *supra*.

If the United States suggested any further arguments, or any other distinctions for the *California* case

they are not readily reflected by a reading of its memorandum.

The United States has failed to suggest a single argument, distinction or rationale which is justified or supported by any case remotely resembling the case at bar.

B. TO THE EXTENT THAT PRIVATE CLAIMANTS SEEK TO CLAIM AGAINST THE UNITED STATES:

1. THE UNITED STATES HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

It is believed that Utah's brief of January 25, 1968 adequately covers this point. It was there pointed out that the legislative history of the Great Salt Lake Lands Act was clear in showing that Congress intended only Utah and the United States to be parties to this litigation. But the United States now contends that if the United States can be joined as "a" defendant, it must be supposed that Congress anticipated other defendants. This is without merit, and flies in the face of the very explicit quotes from congressional hearings which were included in Utah's earlier brief. But in that regard, perhaps one additional excerpt would be in order. On March 9, 1966 the Committee on Interior and Insular Affairs met in session to discuss the subject bill, and T. Richard Witmer, legal counsel for the Committee, made the following explanation concerning this litigation:

> Mr. Rivers: Mr. Chairman, could I ask a question?

The Chairman. Yes.

Mr. Rivers. Mr. Witmer, third parties might benefit in that resolving the controversy between the Federal Government and the State would enable a private person trying to clear his title to deal with one government instead of two.

Mr. Witmer. That is right, if there are any conflicting claims between the United States and third parties. I am not aware that there are, but if there are it would certainly aid them because they would have only one, namely the State to deal with.

Mr. Rivers. In any case, then, they would end up under this amendment of yours with the problem of clearing their title only with respect to the State. They would not have to make the Federal Government a party in interest or party defendant, would they?

Mr. Witmer. As they probably could not in any event.

Mr. King. Would the gentleman yield?

Mr. Rivers. Yes.

Mr. King. What the gentleman says is absolutely correct and, as a matter of fact, there are definitely some conflicts between private individuals and the Federal Government.

Mr. Witmer. Might I stand corrected then.

Mr. King. This is a cause of considerable concern to them so that they would greatly benefit by the enactment of this amendment.

Mr. Rivers. One more question, Mr. Witmer. You said we were endeavoring to fix that boundary once and for good based on a survey under which the Federal Government would take the whole section if it already held a major part and

the State, likewise, would get the whole section if it already had—

Mr. Witmer. Or half-section, if that is what the parties agree on, or quarter-section.

Mr. Rivers. Now, then, suppose the lake goes down some more after this boundary line is established. Would reliction apply hereafter, after the establishment of this firm boundary line?

Mr. Witmer. My answer to that is, no; that section 1 says we hereby convey everything to you, all right, title, and interest, and that will include any rights, titles, or interest which may be based on reliction in the future.

Mr. Rivers. And the rights of private parties down around the lake there, if the lake gets lower.

Mr. Witmer. They will just have to argue that out with the State.

Mr. Rivers. Very good. Thank you.

Published Hearings, House Committee on Interior and Insular Affairs, re HR 1791 and HR 6267, 89th Congress, pp. 180-81

With respect to the question of implied consent to suit by the United States, it has already been pointed out under Point II (A) (1) of this brief, *supra*, that the cases relied on by the United States were admiralty cases, which have been specifically rejected by this Court as inapplicable to civil actions.

2. THERE IS NO JURISDICTION IN AN ORIGINAL ACTION FOR CONTROVERSIES BETWEEN THE UNITED STATES AND A CITIZEN OF A STATE.

There is no jurisdiction in an original action in this Court for Morton to claim against the United States. Morton has no jurisdictional standing in an original action, and if Morton claims against the United States, then the only conceivable jurisdiction must be founded on the United States as a party. But that jurisdiction is appellate, not original. Original actions will be limited to the named parties in Article II, Section 2, and to the named parties only. There plainly and simply is no distribution of jurisdiction in an original action for a claim by a citizen against the United States. The cases cited and discussed under Point II (A) (3) of this brief, *supra,* are fully relevant to this argument.

POINT III. THE MOTION TO INTERVENE BY GREAT SALT LAKE MINERALS AND CHEMICALS CORPORATION SHOULD BE DENIED.

Though the position expressed by Great Salt Lake Minerals and Chemicals Corporation (referred to herein as GSL) is generally favorable to the position of the State of Utah, Utah resists such intervention, whether permissive or as a matter of right. Utah's response to that motion is as follows:

1. To the extent that intervention is based on common questions of law and fact, Utah adequately represents the interests of GSL, a mineral lessee of Utah;

2. To the extent that GSL is fearful that in the future it might have lease problems with either Utah or the United States, such claims not only would com-

plicate and confuse this proceeding, but they are too premature, uncertain, remote and speculative to be susceptible to any adjudication in this action; and

3. To the extent that GSL seeks to claim as a riparian owner of fee land adjacent to the surveyed meander, Utah adopts its printed brief of January 25, 1968, in its entirety as its opposition to such attempt.

CONCLUSION

Neither Morton nor GSL is an indispensable party to this litigation. Neither has a right to intervene, and neither should be permitted to intervene. Further, denial of intervention will preserve the jurisdiction of the Court and permit a speedy determination between Utah and the United States as to what lands, if any, the United States deeded to Utah.

Respectfully submitted,

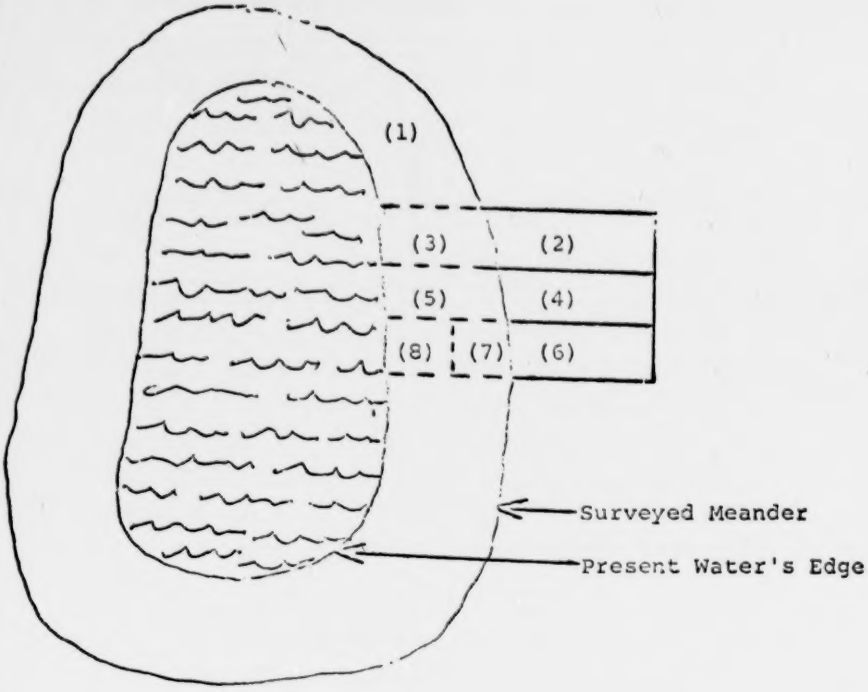
PHIL L. HANSEN
Attorney General
State of Utah

Attorney for Plaintiff

236 State Capitol
Salt Lake City, Utah 84114

February 23, 1968

ILLUSTRATIVE DIAGRAM



EXPLANATORY:

The various classifications of exposed land around the Great Salt Lake can be demonstrated by the numbered areas above as identified by the description of each area as set forth below. The estimated acreages are rough approximations, and the actual acreages would vary from day to day and from month to month with the fluctuating water level of the lake.

(1) Belt of approximately 600,000 acres of exposed land circling the lake, situated between present water's edge and surveyed meander line .

(2) Fee land where ownership retained by the United States.

(3) Claim of United States to 325,000 acres as direct reliction land.

(4) Fee land patented to private person when water's edge was at or near surveyed meander.

(5) Claim of private persons to 167,000 acres as direct reliction lands—not in issue in this litigation.

(6) Fee land patented to private person when water's edge was substantially below surveyed meander.

(7) Substantial land exposed at date of patent. Broken line between (7) and (8) represents water's edge at date of patent.

(8) Land exposed since date of patent. Total land in (7) and (8) combined represents about 108,000 acres, is claimed by both United States and private claimants, and is the only category of land which creates the indispensable party question.

CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D. C. 20006, attorneys for Morton International, Inc.; and, George E. Boss, 10 Exchange Place, Salt Lake City, Utah 84111, and Robert D. Larsen, 1730 K Street, N.W., Washington, D.C., 20006, attorneys for Great Salt Lake Minerals and Chemicals Corporation; by mailing the same, air mail postage prepaid, to their respective offices, this 23rd day of February, 1968, all in accordance with the Rules of this Court.

PHIL L. HANSEN
Attorney General
State of Utah

Counsel for State of Utah

PREME COURT, U. S.

FILED
APR 16 1968

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

BRIEF OF MORTON INTERNATIONAL, INC. IN RESPONSE TO STIPULATION AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

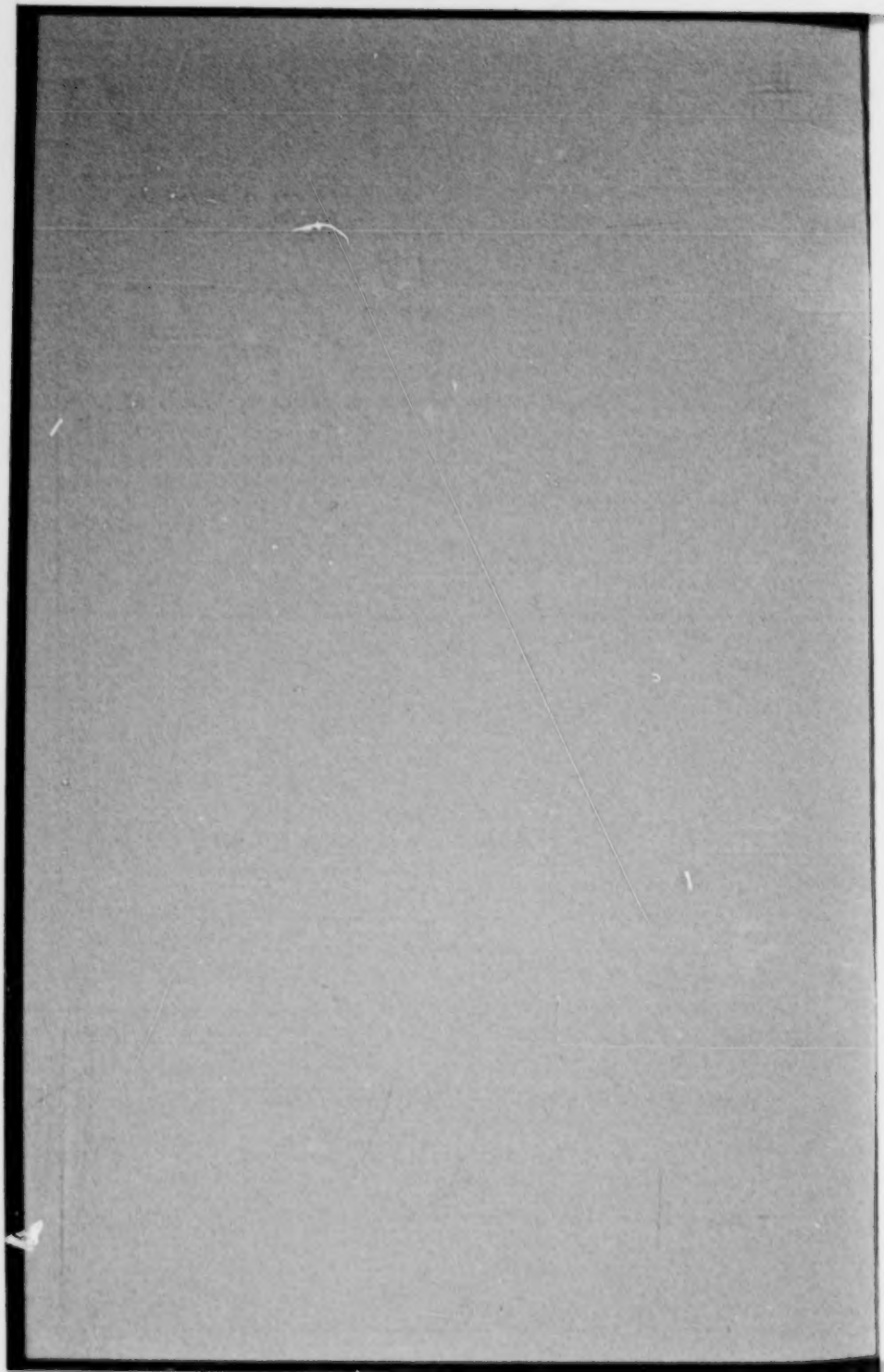
L. M. MCBRIDE
FRANK A. WOLLAEGER
110 North Wacker Drive
Chicago, Illinois 60606

MYER FELDMAN
MARTIN JACOBS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

MCBRIDE, BAKER, WIENKE & SCHLOSSER
GINSBURG AND FELDMAN
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606



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No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

BRIEF OF MORTON INTERNATIONAL, INC. IN RESPONSE TO STIPULATION AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This brief is submitted by MORTON INTERNATIONAL, INC. (hereinafter referred to as "Morton") in response to the Stipulation dated March, 1968, between the United States and the State of Utah and in response to the Supplemental Memorandum filed by the United States regarding the effect of said Stipulation on Morton's motion for leave to intervene, presently before the Special Master.

ARGUMENT

I. THE STIPULATION HAS NO EFFECT ON MORTON'S INDISPENSABILITY AND REQUIRED INTERVENTION

The United States has abruptly reversed its position with respect to Morton's motion to intervene. Without amending the complaint previously filed by the State of Utah or the answer filed by the United States, counsel for those parties have now entered into a stipulation for the purpose of purportedly "limiting the scope of the present litigation." This agreement, in the Government's view, converts Morton from its previous position in this litigation as an indispensable party to an unnecessary party. We disagree that the stipulation has such effect (assuming, *arguendo*, that the stipulation is valid).

The stipulation does not alter either party's claims to the subject matter in dispute. In other words, apart from its invalidity as shown in Point II, the stipulation is merely an agreement between counsel for the parties, not binding on Morton, as to how they will proceed during the course of the litigation. Obviously, this agreement could be rescinded at any time by mutual consent, and the fact that it is in writing rather than verbal does not add dignity to it.

Since the parties' claims remain the same, a brief review of them as set forth in the complaint and answer is appropriate:

Complaint — III	Answer — III
". . . the State of Utah . . . is the owner of the absolute right to the bed of the Great Salt Lake as delineated and determined by the official surveyed meander line of the Great Salt Lake, which meander line represents the mean high water mark of said lake as it existed at date of survey and as it existed at the date of statehood."	Denied to the extent it is an allegation of fact.
• • •	
"The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined."	Denied to the extent it is an allegation of fact.

Complaint — IV	Answer — IV
"The State of Utah believes that the United States of America now claims to own approximately 436,000 acres of the bed of the Great Salt Lake."	Admitted
• • •	

"In fact, the United States of America has no right, title, or interest in or to any of the lands illustrated in Exhibit A [of the complaint] or to any other part of the bed of the Great Salt Lake as located below and within the surveyed meander line."	Denied

Complaint — V	Answer — V
"The State of Utah owns the minerals and brines included within the waters of the Great Salt Lake."	Denied to the extent it is an allegation of fact.

The respective prayers for relief in the complaint and answer make it clear that each party is seeking an adjudication quieting title in it to the lands, brines and minerals described in Section 2 of the Great Salt Lake Lands Act.[1] The fact remains that the United States and Utah each claim lands, brines and minerals which are also claimed by Morton, and in order to determine the right, title and interest of the United States in the lands conveyed pursuant to the Act, the Court will have to determine whether Morton or the United States owns the lands, brines and minerals in dispute between them. Only after this is accomplished will the Secretary of the Interior be able to comply with Section 5(b) of the Act to determine the fair market value of the lands and minerals conveyed.

1. Referring again to the pleadings, the United States has denied Utah's allegation in paragraph III of the complaint that the Great Salt Lake is a navigable body of water. The United States' allegation of lack of knowledge or information sufficient to form a belief as to the truth of

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(1) Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349.

the allegation of navigability constitutes a denial.[2] Thus, the ownership of the brines and minerals in solution in the Lake is an issue in this litigation, and it is plain, as set forth in paragraph 2 of the stipulation, that the United States is asserting ownership of "*all* the brines and minerals in solution" in the Lake and of "*all* of the presently submerged lands underlying the Lake." (Emphasis added)

The United States' claim of ownership of all the brines and minerals and all the submerged lands obviously encompasses the brines, minerals and submerged lands claimed by Morton. This claim of ownership can be predicated on either or both the following theories:

> (a) The Basart lands extend to the thread of the non-navigable Lake.
>
> (b) The lack of intent on the part of the United States to convey the bed of the non-navigable Lake in the patents granting title to the uplands. See *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77 (1922); *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

Accordingly, the disclaimer in paragraph 6 of the stipulation as to the effect of a judgment on the title of third parties claiming lands, brines or minerals is meaningless. A decision that either the United States or Utah owns *all* the submerged lands, brines and minerals in the Lake in effect will adjudicate the title of Morton and will necessarily adversely affect its interests.

We are aware of no case in which title to all the brines or minerals in solution in a non-navigable body of water has been allocated among the riparian owners and this complex problem is one which the Court may well have to resolve. It is clear, however, that a person claiming title to a body of water is an indispensable party to a suit over ownership

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(2) Federal Rules of Civil Procedure, Rule 8(b).

of that water. *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950), involved an action by the United States to quiet title to waters wholly within California against a licensee of the State of California which was diverting a portion of the water for irrigation purposes. The State of California moved to intervene as owner of the water, the denial of which motion was reversed by the court of appeals stating (180 F.2d at 602):

> "The State is asserting an interest in the subject matter as the absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. That is a sufficient interest in the subject matter to entitle it to be heard just as much as if the State were joined by the United States originally as a defendant."

Despite Utah's theory of navigability set forth in the complaint, it is apparent, as is recognized in Utah's motion to file the complaint, that there are various other theories upon which Utah depends to support its claim to all or part of the property in dispute. Therefore, this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability. For example:

> (a) the Lake could be held to be navigable and the "mean high water line" fixed substantially below the meander line resulting in a division of the relicted lands between Utah and the upland owners, or
>
> (b) the Lake could be held to be navigable and only relictions existing before statehood be held to be the property of the upland owners, or
>
> (c) the Lake could be held to be navigable with all relicted lands held to be owned by the upland owners to the water's edge wherever it may be from time to time.

There could be other variations, of course, predicated on Utah's theory of man-made diversions, etc., as mentioned in its motion, but the foregoing are sufficient to illustrate

that the stipulation reflects only a superficial consideration of the substantive issues involved.

2. But even assuming that the stipulation could effectively remove from litigation the lands claimed by private parties, Morton's property rights would still be adversely affected by a decision in this suit. Pursuant to Section 6 of the Great Salt Lake Lands Act, Utah is authorized "to issue permits, licenses, and leases covering such of these lands as the State deems necessary or appropriate to further the development of the water and mineral resources of the Great Salt Lake or for other purposes." Since part of the lands and minerals claimed by the United States are claimed by Morton, the Act authorizes Utah to lease property which the United States may not own. Furthermore, Section 6 provides that all proceeds derived by Utah from the leases and licenses shall be paid to the United States as part of the compensation for the lands conveyed. Section 6 further provides:

> "If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title and interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest."

Obviously, however, if Morton owns part of the lands leased, the proceeds therefrom are Morton's property, the disposition of which will depend on the Court's decision. Neither the United States nor Utah has the right to take possession of another person's property and deprive him of the profits therefrom. Unless Morton is permitted to intervene to protect its right to these proceeds as well as to the lands and minerals in dispute, it will, in effect, be rendered remediless.

It is no answer to say that Morton can sue either the United States or Utah for the wrong done to it in depriving it of this money, since neither sovereign can be sued without its consent. Although Utah and the United States recognize in paragraph 8 of the stipulation that these payments may constitute a private person's property and that there would be liability therefor, the doctrine of sovereign immunity is ignored as is the fact that a decree will affect the disposition of this property.

The last word of the Court on the doctrine of indispensability is *Provident Trademens Bank & Trust Co.* v. *Patterson,* ..... U.S. ....., 88 S. Ct. 733 (1968), decided January 29, 1968, in which the Court, while reversing the court of appeals for not pragmatically analyzing the facts, clearly adheres to the criteria established in previous decisions. The pragmatic approach to be used in determining whether an absent person must be joined as a party is clearly not intended by the Court to mean mere expediency in resolving a difficult problem. This stipulation is an excellent example of an expedient approach on the part of the United States and Utah, which completely ignores the practical effect of the non-joinder of Morton. The Court in discussing the interest of the outsider expressly adopts the criteria of Rule 19(a) (88 S. Ct. at 738):

> "[T]he Court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter."

Applying this criterion to Dutcher, the outsider, the Court stated (88 S. Ct. at 737):

> "We may assume, at the outset, that Dutcher falls within the category or [sic] persons who, under §(a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a

> fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him."

Dutcher had not sought to intervene prior to trial and it was not until the matter had gone to judgment and appeal, after years of litigation, that the court of appeals dismissed for lack of an indispensable party. In this case, which is in its initial stages, it is apparent that property, whether land, brine, minerals or money, claimed by Morton will be disposed of as a result of the Court's decree, regardless of whether or not the stipulation can be carried out. Pursuant to Section 3 of the Great Salt Lake Lands Act, the United States has expressly reserved all mineral rights, except as to brines and minerals in solution, in the lands conveyed to Utah under Section 2 and this includes the Basart lands. In any suit brought by Morton against Utah, assuming consent on the part of Utah, to test the title to the Basart lands, the United States, due to this reservation, would clearly be an indispensable party and it cannot be joined without its consent. Obviously, a disposition by reason of this litigation would "as a practical matter impair or impede" Morton's ability to protect its interest.

Since Morton's joinder will not deprive the Court of jurisdiction of the subject matter of the action—the position that the Solicitor General previously argued and to which he still adheres (see Supplemental Memorandum, p. 3—its joinder is required under Rule 19(a). Whether the Court will lose jurisdiction if other persons are joined, or whether the case should be dismissed pursuant to Rule 19(b) if they cannot be joined, has no bearing on Morton's motion.

The fourth criterion set forth by the Court in the *Provident* case is also clearly applicable to this situation, i.e., (88 S. Ct. at 739):

> "Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the non-joined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent."

The piecemeal judgment suggested by the stipulation before the Court would not be "adequate" from the point of view of the public's interest "in complete, consistent, and efficient settlement" of the dispute with respect to the lands lying below the meander line.

II. THE STIPULATION IS AN ACTION NOT AUTHORIZED BY CONGRESS AND IS THEREFORE INVALID

A. The Stipulation Is Contrary To The Provisions Of The Great Sale Lake Lands Act

By this stipulation, the Solicitor General and the Attorney General of Utah are attempting, for the sake of convenience, to amend the plain language and intent of the Great Salt Lake Lands Act. The requirements of Section 5(b) of the Act are that Utah "may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act . . ." and that "Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value,

as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act as may be found by the court to have been the property of the United States prior to the conveyance." Despite this unequivocal language that the United States' title is the subject of adjudication, paragraph 1 of the stipulation states:

> "Notwithstanding anything to the contrary in the Complaint filed herein by the State of Utah or the Answer filed by the United States, the *only objective* of the present suit is to determine whether, as against the United States, *the State* held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441." (Emphasis added)

On the basis of this stipulation, the Solicitor General, in his supplemental memorandum, arrives at the remarkable conclusion that there need be no adjudication of the United States' title in the lands.

An excellent refutation of the approach represented by this stipulation was made by the Solicitor General during the hearings before the Special Master on February 9, 1968 as follows (Transcript, pp. 27-32):

> "[Mr. Griswold] Now, the situation is different with respect to Morton International. Morton is making a claim to land adverse to the State of Utah and adverse to the United States.
>
> "With respect to the lands which come within the Basart Doctrine, the United States claims those lands and Morton International claims those lands. And I find no escape in my own mind from the conclusion that

Morton International is an indispensable party, because under the Statute and under the pleadings of the State of Utah, Utah is claiming title to these lands.

"The Secretary of the Interior is directed to convey all of the lands to which the United States may have title, and he is then directed to determine the fair market value of such lands, and that is the lands which are to be conveyed, and it is that amount which the State of Utah is under obligation to make payment, if it accepts the amount. And I do not see how this Court can render the judgment, *which is required by the Statute*, and which is sought by Utah's pleadings, without determining whether these various tracts of land are indeed owned by the United States or are owned by Morton International.

"JUDGE GANEY: Isn't Utah the only one that has any concern about that? It is only the lands that they may have title to? Morton hasn't any concern about whether Utah gets all this land, have they?

"MR. GRISWOLD: As I see it, that is not the way the Statute is written, *and I assume that the way the Statute is written defines the consent of the United States to this suit.*

"The way the Statute is written is that all lands owned by the United States shall be conveyed to the State of Utah.

"JUDGE GANEY: Except valid claims.

"MR. GRISWOLD: And we have no way of determining whether these claims are valid or not except by having them litigated before this Court.

"The United States claims these Basart lands, Morton International claims these Basart lands. If the United States' claim that it owns the land is sound, then it is entitled to have those lands included in the lands that are valued by the Secretary of the Interior and are paid for by the State of Utah.

"If the claim of the United States is not sound, then these lands are excluded from the conveyance to Utah and from the payment of the right of Morton remains inviolate, but that question cannot be determined until it is litigated. And I find no escape from the conclusion that Morton and others similarly situated are indispensable parties to this case because the question of their title or not is absolutely essential to the determination of what lands are conveyed to Utah; and on that basis what lands Utah is obligated to pay for.

"JUDGE GANEY: What is your suggestion, assuming, without deciding, that they are not indispensable and the Court could prepare a decree, as I have indicated, and convey to Utah all those lands which are uncontested, and that would leave Morton, as I said to Mr. Wollaeger, in the same position as they are today, there is no impairment under the guideline which Mr. Justice Harlan laid down, and that is the last that I know of, the last of the criteria which ought to be applied as to indispensable parties. What harm comes to Morton?

"MR. GRISWOLD: *As I have thought about this problem over the last two weeks, there have been times when it seems to me that a solution might be if Utah would be willing to amend its bill so as to make it applicable only as to such areas of land, and it might have to specify them by metes and bounds, which might be an enormous task, only as to such land as to which there was no other claim, thus narrowing the case to the areas which are vast, where the sole issue is between the United States and the State of Utah. And that would eliminate all questions of other, or indispensable, parties.*

"*But I am afraid that that just wouldn't comply with the Statute as Congress has enacted it.* Maybe we could get the Statute amended to make it applicable only to lands as to which there is no other claimant, but the Statute provides that the Secretary of Interior shall by quit-claim deed convey to the State of Utah

all right, title and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake, and these Basart lands are lands, which lie below the meander line of the Great Salt Lake.

"Title to them is claimed by the United States and, indeed, it is not limited to Basart lands. As I understand it, there are some other lands where title is owned by the United States, and unless the United States conveys all its lands, it does not comply with the Statute.

"The provision of the Statute with respect to Utah 'may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to Section 2 of this Act.' And the lands conveyed to Utah under Section 2 of the Act are all right, title and interest in lands below the meander line, and they include the Basart and the other lands, and I don't see how you can determine what lands are to be conveyed, what lands are to be adjudicated, and what lands are to be paid for, unless you determine the claims of Morton International and, as far as I can see, of any other claimant to these lands other than the United States.

"On that basis, it seems to me that parties who claim adverse to the United States are indispensable parties.

"JUDGE GANEY: What is your thought back to the exception of valid claims in the Statute?

"MR. GRISWOLD: If this Court adjudicates that Mortor [sic] has a valid claim, then this consequence is that the conveyance made by the Secretary of the Interior does not include that land.

"JUDGE GANEY: You think it must be determined first, not on mere allegation, but there must be a determination of title?

"MR. GRISWOLD: I don't see how that can be avoided, because if this Court determines that the title is in the United States, then it is covered by the conveyance and is to be valued and paid for by the State of Utah. *I don't see how you can duck that, or dodge it, or escape it.*

"I repeat, a possible solution would be to see some kind of amendment of the Statute which would narrow the conveyance to what might be called the in-dispute lands, meaning by that, only the dispute between Utah and the United States remaining. Whether that would be acceptable to Utah or not, I don't know. If the Statute were so amended and Utah then amended its bill under the Statute, it would be conceivable that this case in this Court could be confined to the distpute [sic] between the United States and Utah. That would, of course, leave a large amount of loose ends out there, from which there is no easy way to see how they could be resolved."

(Emphasis added)

And, again, quoting the Solicitor General (Transcript, pp. 77-81):

"MR. GRISWOLD: I share to some extent the wish or hope of the State of Utah that this could be kept a nice, simple case with two parties, because it obviously presents problems, both practical and legal, if it can't.

"But with respect to the suggestion that since a quitclaim deed has already been given, there is no legal problem, I find myself getting back to the Statute which underlies this whole proceeding.

"You will recall that the State of Utah had an option to either proceed without a Court decision or to start an original action in the Supreme Court of the United States, and the language of the Statute with respect to the second option, which is the one which has been followed, the State may maintain an action in the Supreme Court of the United States to secure a judi-

cial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah, pursuant to Section 2 of this Act.

"So that the proceeding is to determine, is to obtain a judicial determination of the right, title and interest. It isn't enough to say the United States, or whatever it is, quit-claims it. There must be a determination of what is the right, title and/or interest of the United States, and specifically as between the United States and Morton Salt, that becomes an issue because if the land belongs to Morton Salt, then the United States has no right, title or interest and the quit-claim deed conveyed no interest.

"*Then the Statute goes on, consent to join the United States as a defendant to such an action is hereby given. That is an action to determine the right, title and interest of the United States.* Then the Statute goes on, within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value as of the date of the decision of the Court, of such lands conveyed to the State, and not until you determine what lands were in fact conveyed to the State by the quit-claim deed, and that involves the resolution of the issue between the United States and Morton Salt, to use it as an example, but all the other possible claimants, too, and not until that question has been determined is the objective of the suit carried out.

"So I find, simply, no escape, much as I would like to do it otherwise, from the proposition that persons who claim adversely to the United States are indispensable parties without whose presence this action, *as contemplated by the Statute and to which Congress has given its consent*, simply cannot be carried out.

"JUDGE GANEY: In summary, you say that the Statute, the basic right here, gives the United States the right to have determined the validity of its lands there?

"MR. GRISWOLD: Yes, sir, Your Honor.

"JUDGE GANEY: You think that is the contemplation and Congressional intent in the passage of this Act giving permission, basically, to the United States?

"MR. GRISWOLD: Because it is only such lands which the United States owns which are conveyed to Utah, and for which Utah must make payment, and which is the object of this decision.

"JUDGE GANEY: But Utah doesn't want lands that are not, that are in dispute. Why must there be a decision to the validity of Morton Salt and 100 other claimants here in this action before the United States could convey to Utah?

"MR. GRISWOLD: I quite agree, Your Honor, the Statute could have been drafted differently. It could have been drafted to provide for a conveyance to the State of Utah of all lands not owned by any other party and not disputed as to title, between the United States and any other party, *but the Statute is perfectly plainly worded.*

"JUDGE GANEY: Yes, I have read its many words.

"MR. GRISWOLD: For a judicial determination of the right, title and interest of the United States, and with respect to the lands that Morton Salt claims and the United States claims, *you cannot comply with the terms of the Statute without determining whether the United States is wrong or Morton Salt is right.*

"JUDGE GANEY: Well, you read that in. Maybe that is correct. The validity of all of the lands there must be conveyed to Utah. They must be conveyed. Otherwise, the Statute is of no effect.

"MR. GRISWOLD: If the lands Morton Salt claims does not, in fact, belong to Morton Salt, then it is covered by this conveyance which the United States has already given and must be paid for by the State of Utah.

"JUDGE GANEY: Yes, but Utah isn't concerned with that. They are the persons bringing this suit. Why should the United States be concerned with what lands Utah demands?

"MR. GRISWOLD: Because the United States will get payment for it and Utah must make payment.

"JUDGE GANEY: For only the lands that Utah wants.

"MR. GRISWOLD: No, for all of the lands in which the United States has title. Not just the land that Utah wants.

"JUDGE GANEY: But they aren't suing for all the lands. They are suing, it seems to me, for all the lands of the United States, except those that are in dispute.

"MR. GRISWOLD: No, I am sorry. It might well have been that. That might have been in retrospect a convenient way to have drafted the Statute. But the Statute provides for a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah, and the lands conveyed to the State of Utah are all the right, title and interest of the United States in lands lying below the meander line of the Great Salt Lake. And if the United States, in fact, owns these lands that Morton Salt claims, and other claimants claim, that land is conveyed to the State of Utah and the State of Utah is obligated to pay for it."

(Emphasis added)

The temptation to try the stipulation device to keep this "a nice simple case with two parties" has evidently overpowered reason. The Solicitor General was right the first time.

B. The Agreements To Convey And The Conveyances Provided For By This Stipulation Are Beyond The Power Of The Solicitor General; Moreover, The Agreement Of The Attorney General Of Utah Is Not Binding On The State

1. Despite the requirements of the Act that Utah shall pay the fair market value, as determined by the Secretary,

"of such lands (including minerals)" conveyed to Utah "as may be found by the Court to have been the property of the United States prior to the conveyance," the Solicitor General pursuant to this stipulation has agreed:

> "Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as 'public domain reliction lands,' the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership prior to June 15, 1967, of the uncovered lands indicated on the attached map as 'public land reliction under *Basart*,' and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441."

In other words, the Solicitor General is agreeing, purportedly on behalf of the United States, that the United States will convey the Basart lands to Utah without compensation if Utah should successfully show that it has title to "public domain reliction lands." There is nothing in the Act, however, which can possibly be construed to delegate to the Solicitor General (or to anyone else in the Executive Branch of the Government) the authority to make such an agreement, nor to relinquish Federal rights in lands without compensation unless and until such lands have been determined by the Court, pursuant to the Act, not to have been owned by the United States.

Accordingly, the agreement to relinquish Federal rights is invalid and the conveyance of such lands would be void. As stated by this Court in *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority."

See also *Alabama* v. *Texas*, 347 U.S. 272 (1954).

2. With respect to the Attorney General of Utah's power to bind the State to pay for the Basart lands without adjudication of title thereto as provided in paragraphs 3 and 4 of the stipulation or to indemnify the United States as provided in paragraph 8 of the stipulation, Section 4(5) of the Utah legislation authorizing the State to initiate this action[3] provides:

> "No money payments to the United States other than proceeds paid to the United States from permits, licenses, and leases issued by the State on lands below the meander line as provided in S-265 shall be made without specific appropriation by the State Legislature."

It seems clear that the Attorney General's undertakings are also beyond his power and not binding on the State, at least with respect to this specific piece of litigation.

III. TO PRESERVE ITS CONSTITUTIONALITY THE ACT SHOULD BE CONSTRUED TO REQUIRE MORTON'S INTERVENTION

If the Great Salt Lake Lands Act could be construed to prevent a private party such as Morton from intervening to protect the validity of its title or its property interest, the Act would be unconstitutional as a deprivation of property without due process of law prohibited by the Fifth Amendment. A person's property rights are not subject to impairment by legislative action. *Choate* v. *Trapp*, 224 U.S. 665 (1911); *Union Pacific Railroad Co.* v. *United States*, 99 U.S. 700 (1879). Such a construction is to be avoided. In the interpretation of a Federal statute it is a cardinal principle of the Court to reach a conclusion which will avoid serious doubt as to the statute's constitutionality. *United States* v. *Rumely*, 345 U.S. 41 (1953). Nor will the Court lightly impute to Congress an intent to invade the

---

[3] Laws of Utah, 1966, 2d Spec. Sess. ch. 11.

rights protected by the Bill of Rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960).

We would hope that the issue of the constitutionality of the Act can be avoided in the interest of obtaining a judicial resolution of the important substantive questions involved in this case.

CONCLUSION

For the reasons set forth in this brief Morton's motion to intervene should be granted.

Respectfully submitted,

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsberg and Feldman
Of Counsel

April, 1968

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114; and George E. Boss, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by having the same delivered to their respective offices, in accordance with Rule 33 of the Rules of this Court.

FRANK A. WOLLAEGER
Counsel for Morton International, Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

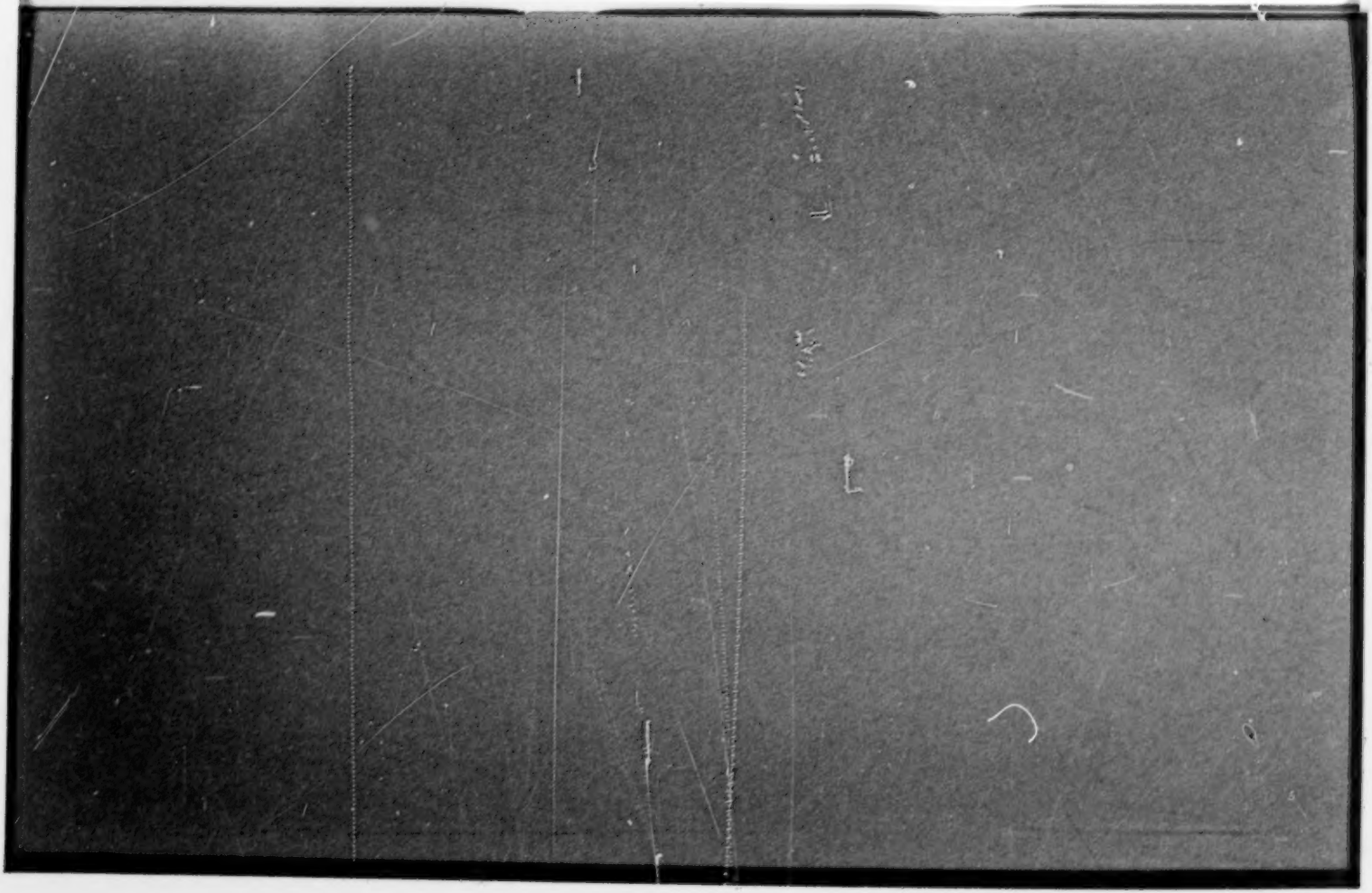
UNITED STATES OF AMERICA, *Defendant*.

MEMORANDUM OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION REGARDING STIPULATION BETWEEN UNITED STATES OF AMERICA AND STATE OF UTAH

GEORGE E. BOSS
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers & Wells
1730 K Street, N.W.
Washington, D. C. 20006

Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION



IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, ORIGINAL

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

MEMORANDUM OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION REGARDING STIPULATION BETWEEN UNITED STATES OF AMERICA AND STATE OF UTAH

The United States has claimed, in essence, that this is an *in rem* action to quiet title to the lands and minerals in controversy, and, therefore, any party claiming title therein is indispensable to this litigation. The State of Utah has asserted that the action is not as broad in scope as claimed by the United States, that the enabling legislation never intended it to be, and that no other party is indispensable. It also is of the opinion that if private upland fee owners, who were Utah citizens, were allowed to intervene as defendants, this Court would be ousted of jurisdiction.

In its original and supplemental motions to intervene in this litigation, Great Salt Lake Minerals & Chemicals Corporation (hereinafter called "GSL") asserted that the

Congress and the Utah Legislature intended that this action be initiated solely for the purpose of determining which of the two sovereigns had the paramount right, as between themselves, to the lands and minerals in controversy. It also was GSL's contention that this case could and must proceed to an adjudication of that question.

Upon the filing of motions to intervene by Morton International, Inc. and GSL, the State of Utah raised the question of whether the inclusion of these parties as indispensable parties, with the consequent necessity for joining similarly situated Utah citizens as defendants, would oust this Court of jurisdiction. The United States and the State of Utah differed on the answer to this question.

This difference appears to have been resolved by the subject Stipulation filed herein limiting and defining the issues to be decided between the sovereigns, thereby attempting to eliminate the indispensability problem. GSL has no objection to this approach, provided that, as between the sovereigns, there will be a final adjudication as to all their claims to the subject lands and minerals. Although GSL believes it was so intended, it is not entirely clear that the Stipulation accomplishes this.

Paragraph 1 of the Stipulation refers to lands, brines and minerals claimed to be owned and conveyed to the State of Utah by the United States on June 15, 1967. Paragraph 2 states that the United States is undecided at this time as to whether it will assert a claim to the submerged lands and the minerals in solution and is reserving the right to do so. If the foregoing is intended to mean that the United States may adjudicate these claims at any

time subsequent to a final disposition of all other issues in this case, then GSL objects to the Stipulation. A resolution must be had as to which of the two sovereigns, as between themselves, has the right to the subject lands and subject minerals. Anything short of this would be objectionable to GSL, and most certainly would be less than what the Congress and the Utah Legislature intended. It would leave the title questions at the Great Salt Lake unanswered for an indefinite period, leaving the situation as uncertain as it was prior to this action.

Notwithstanding its support of the Stipulation (subject to the foregoing qualifications) GSL still urges the Court to allow its intervention as a necessary and proper party pursuant to its original and supplemental motions filed herein. The reasons set forth in GSL's motions are no less supportable because of the subject Stipulation. Its substantial interests in this controversy support the granting of is intervention, and certainly GSL's presence would not create a jurisdictional obstacle or unduly delay or prejudice the adjudication of the rights of the original parties.

GEORGE E. Boss
Senior & Senior
10 Exchange Place
Salt Lake City, Utah 84111
ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
1730 K Street, N.W.
Washington, D. C. 20006
Attorneys for GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION

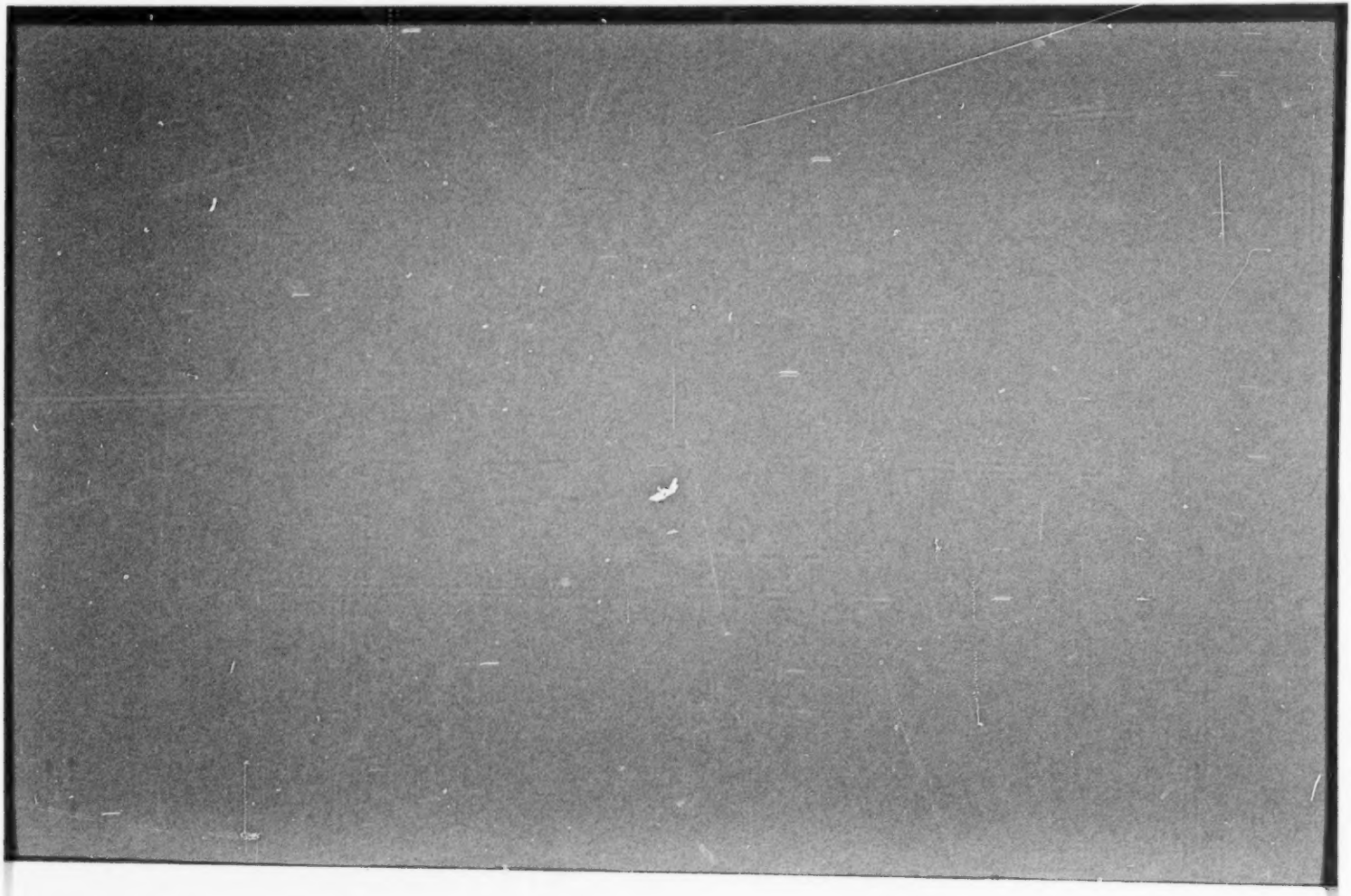
April 16, 1968

CERTIFICATE OF SERVICE

I, GEORGE E. BOSS, Counsel for Great Salt Lake Minerals & Chemicals Corporation, applicant for Intervention herein, and a member of the Bar of this Court, hereby certify, in accordance with Rule 33 of the Rules of this Court, that five (5) copies of the foregoing Memorandum of Great Salt Lake Minerals & Chemicals Corporation Regarding Stipulation between United States of America and State of Utah were served by mail upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530, Counsel for Defendant United States of America; L. M. McBride and Frank Wollaeger, of McBride, Baker, Wienke & Schlosser, 110 North Wacker Drive, Chicago, Illinois 60606, and Myer Feldman and Martin Jacobs, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for Morton International, Inc.; and the Attorney General of the State of Utah, State Capitol Building, Salt Lake City, Utah 84114, Counsel for the State of Utah, this 16th day of April, 1968.

GEORGE E. BOSS

April 16, 1968



In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ON BILL OF COMPLAINT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In previous memoranda, the United States asserted that the present applicants for intervention, Morton International, Inc. and Great Salt Lake Minerals & Chemicals Corporation, and other private landowners similarly situated, were indispensable parties to this litigation. The reason for that submission was that these landowners are claiming lands also claimed to have been owned by the United States prior to its conveyance to the State of Utah on June 15, 1967, and that, under Public Law 89-441, the State is bound to pay only for lands which are adjudicated to have belonged to the United States at the time of the

conveyance. Thus, it seemed necessary to determine whether the United States or the private claimant was the true owner of these contested lands—primarily the uncovered lands claimed by the United States under the so-called "*Basart* doctrine" and, also, if the United States should assert a claim thereto, the presently submerged lands underlying the Great Salt Lakes (together with the brines and minerals in solution) adjacent to upland patented to private persons.

It now appears, however, that the State of Utah is agreeable to so limiting the issues as to make unnecessary any determination as to who, if not the State, is the true owner of the lands claimed (or potentially claimed) both by the United States and private landowners. As the attached stipulation makes explicit, the State is prepared to end the litigation and bind itself to pay the United States with respect to any lands as to which it is unable to establish its own superior title without any adjudication as to whether the United States is the true owner thereof. The net effect is that there need be no adjudication whatever with respect to the *Basart* lands, nor any determination with respect to the presently submerged lands or brines or minerals in solution of the Lake (if the United States asserts a claim thereto) except only whether Utah's title is superior to that of the United States.

Although the State was, in our view, entitled to press the litigation further, we can appreciate no reason why it may not limit its case in this way—especially since the practical effect of the suit is merely to determine what lands the State must pay

for and since it was always free to pay without any litigation.

Given the present narrow scope of the suit and the protective provisions of the attached stipulation, we believe the applicants for intervention (and others similarly situated) are no longer indispensable parties. Although we adhere to the view that their participation as parties would not defeat the Court's jurisdiction, we submit that this question can properly be avoided by denying their motions to intervene.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1968.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

STIPULATION

The State of Utah and the United States agree and stipulate as follows:

1. Notwithstanding anything to the contrary in the Complaint filed herein by the State of Utah or the Answer filed by the United States, the only objective of the present suit is to determine whether, as against the United States, the State held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441.

2. The presently uncovered lands which the United States claims to have owned and conveyed to the State on June 15, 1967, are correctly shown on the attached map, and comprise approximately 325,574 acres indicated as "public domain reliction" and approximately 108,780 acres indicated as "public land reliction under *Basart*." In addition, the United States reserves the right to assert that it owned and conveyed to the State on June 15, 1967, all the brines and minerals in solution in the brines of the Great Salt Lake and all of the presently submerged lands underlying the Lake, and the State reserves the right to contest the propriety of asserting such a claim in this litigation.

3. Should the United States assert that prior to June 15, 1967, it owned the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands underlying the Lake, and should the State fail to establish its own superior title as against the United States to these brines, minerals and submerged lands, the State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the lands (uncovered and submerged) and brines and minerals described in paragraph 2 and shall be bound to pay the United States the fair value of all such lands, brines and minerals in accordance with Public Law 89-441, or the conveyance thereof shall be null.

4. Should the State establish its own superior title as against the United States to the brines and min-

erals in solution in the brines of the Great Salt Lake and the presently submerged lands of the Lake, but fail to establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the uncovered lands described in paragraph 2 (including those designated as "public domain reliction" and those designated as "public land reliction under *Basart*" on the attached map) and shall be bound to pay the United States the fair value of all such uncovered lands in accordance with Public Law 89-441, or the conveyance thereof shall be null.

5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership prior to June 15, 1967, of the uncovered lands indicated on the attached map as "public land reliction under *Basart*," and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441.

6. In no event shall the judgment herein be taken as adjudicating or affecting the title of persons or corporations claiming lands (uncovered or submerged), brines or minerals below the meander line of the Great Salt Lake, whether those which the United States claims to have owned prior to June 15,

1967, or others; nor shall the conveyance of June 15, 1967, from the United States to the State or any subsequent payment by the State to the United States affect the validity of such claims.

7. Neither this stipulation nor the judgment herein shall affect title to the minerals reserved to the United States by Section 3 of Public Law 89-441 and excepted from the conveyance of June 15, 1967, executed pursuant thereto.

8. The State expressly waives any claim to the return of any payment made to the United States pursuant to Public Law 89-441 for lands (uncovered or submerged), brines or minerals conveyed to the State on June 15, 1967, should it be determined in subsequent proceedings that such lands, brines or minerals were owned by others and not the United States; and although the State and the United States believe that any payment so made will be the property of the United States and will not be subject to any claim by any other person, the State agrees to indemnify the United States should it be adjudicated to be liable to any claimant with respect to any such payment on the ground that the United States was not the true owner of such lands, brines or minerals on the date of the conveyance.

9. This stipulation is for the purpose of identifying, clarifying and limiting the scope of the present litigation and any judgment or decree entered herein, and shall not be construed to alter the burden of proof or the burden of proceeding with the evidence other-

wise attributable to either party in asserting its respective claims and defenses against the other.

PHIL L. HANSEN,
Attorney General,
State of Utah.

ERWIN N. GRISWOLD,
Solicitor General,
United States of America.

MARCH 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 295791 697

FOLDOUT(S) IS TOO LARGE TO BE FILMED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

JOINT MOTION FOR LEAVE TO FILE STIPULATION AND BRIEF IN SUPPORT THEREOF

PHIL L. HANSEN,
Attorney General of the State of Utah,
State Capitol,
Salt Lake City, Utah 84114.

ERWIN N. GRISWOLD,
Solicitor General of the United States,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

JOINT MOTION FOR LEAVE TO FILE STIPULATION

The State of Utah and the United States jointly move the Court for leave to file their stipulation dated March 29, 1968, a copy of which is attached, and, if the stipulation is construed to work an amendment of their respective pleadings, then so to amend said pleadings.

PHIL L. HANSEN,
Attorney General of the State of Utah.

ERWIN N. GRISWOLD,
Solicitor General of the United States.

MAY, 1968.

306-636—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE STIPULATION

On March 29, 1968, the State of Utah and the United States, presently the only parties to this action, entered into the attached stipulation, submitting it to the Special Master and serving copies on potentially affected applicants for intervention, Morton International, Inc., and Great Salt Lake Minerals & Chemicals Corporation. Subsequently, on April 22, 1968, printed copies of the stipulation, including one bearing the manuscript signatures of the Attorney General of Utah and the Solicitor General of the United States, were deposited with the Clerk of this Court. At the suggestion of the Special Master, we are now formally seeking leave to file the stipulation, with a request

that the present motion be referred to the Special Master.

This procedure seems appropriate in light of the fact the stipulation may be viewed as effectively amending the prior pleadings of the parties, action which may require leave of Court under Rule 15 of the Federal Rules of Civil Procedure, arguably applicable to this case by virtue of Rule 9(2) of the Rules of this Court. While the Court's order of June 12, 1967 (388 U.S. 902) might be viewed as authorizing the Special Master to act initially without further order of the Court, the intervening orders of October 23, 1967 (389 U.S. 909) and March 11, 1968 (390 U.S. 977), expressly referring other motions to the Special Master, suggest a like course in this instance.

Respectfully submitted.

PHIL L. HANSEN,
Attorney General of the State of Utah.

ERWIN N. GRISWOLD,
Solicitor General of the United States.

MAY, 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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IN THE

Supreme Court of the United States

No. 31, Original.

October Term, 1967.

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-4711 Area Code 215

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IN THE

Supreme Court of the United States.

No. 31, ORIGINAL

OCTOBER TERM, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

Pursuant to the orders of the Court entered on June 12, 1967 (388 U.S. 902), October 23, 1967 (389 U.S. 909), March 11, 1968 (390 U.S. 977), and March 29, 1968 (— U.S. —), your Special Master submits the following report and recommendations:

I.

SUMMARY OF RECOMMENDATIONS.

(a) The parties should be granted leave to file their Stipulation of March 29, 1968, with the omission of the second sentence of Paragraph 2 and the word "Should" in Paragraph 3 of the Stipulation; as the Stipulation will then read, there is put in issue the title to the brines and minerals in solution, and this matter is, accordingly, not left to the whim of the United States to assert title at some later date. It is with these omissions, in the Stipulation, incumbent on the State to presently establish superior title to the covered and uncovered land and the brines and minerals in solution and pay the fair market value thereof in accordance with Public Law 89-441,

(b) The motion of Morton International, Inc., to intervene as a defendant and answer should be denied on the ground that the State of Utah has not consented to sue that corporation in this action. If the motion is interpreted as also seeking leave to file a cross-claim against the United States, since the prayer for relief of its proposed Complaint states that the United States is without any right or title to the relicted land and bed of the Lake, such motion should be denied for it would be suing the United States without Constitutional authority,

(c) That portion of the supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene, in the alternative, as a defendant, and its answer should be denied for the same reason as stated in the first sentence of (b) above,

(d) The motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a plaintiff, and its Com-

plaint should be denied on the ground that this Court is without original jurisdiction to entertain a controversy between a private corporation and the United States,

(e) The remaining portion of the supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene, in the alternative, as a defendant, and its cross-claim (against the United States) should be denied for the reason stated in (d) above, and additionally if it may not be a party, it may not file a cross-claim,

(f) The Court should not dismiss the Complaint on "indispensable" party grounds, and

(g) The Court should not refuse to exercise jurisdiction over this action, and thus permit the State of Utah and the United States to proceed to the merits of this action.

II.
INTRODUCTION.

The civil *in personam* action here involved is being brought by the State of Utah for the purpose of having the Court adjudicate conflicting claims between it and the United States to certain land within the meander line[1] of the Great Salt Lake, the bed and minerals in solution in the Lake. The State of Utah seeks to quiet its alleged title by a judicial determination that title to this land, with certain exceptions, belongs to it and that the United States has no right, title or interest in it or the minerals in solution. The action was instituted pursuant to Article III, Section 2, Clause 2, of the Constitution of the United States, and § 5(b) of the Act of June 3, 1966, 80 Stat. 192 (Public Law 89-441, § 265), which is entitled "An Act to authorize conveyance of certain lands to the State of Utah based upon fair market value." Section 6 of the Act has been amended by the Act of August 23, 1966, 80 Stat. 349.

Morton International, Inc. ("Morton"), a Delaware corporation, seeks to intervene in this action as a *party defendant*.

Great Salt Lake Minerals & Chemicals Corporation ("M & C Corporation"), likewise a Delaware corporation, has also sought to intervene as a *party plaintiff*. It has filed a supplemental motion to intervene, in the alternative, as a *party defendant* in order to assert its defense against the State of Utah and its claims against the United States via a *cross-claim*.

The State of Utah opposes the motions to intervene. The reasons given is that it has not consented to sue, or be sued by, the would-be intervenors in this action. However,

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1 A line representing the mean high-water mark of a body of water at a certain date.

under the Complaint the United States did not object to the intervention of Morton, but did object to M & C Corporation's intervention.

After the parties sought leave to file a Stipulation on March 29, 1968, the United States objected to the intervention of Morton, and also to that of M & C Corporation, regardless of its status as a fee owner or lessee. The would-be intervenors see no change in their positions even though the Stipulation requires only that as between the United States and Utah, the State of Utah must establish a superior title to lands against the United States.

For a proper understanding of the questions raised in this action, it may be appropriate to set forth some "historical" background and a brief summary of the proceedings so far.

III.

BRIEF BACKGROUND.

On September 9, 1850, the land which was to become the State of Utah was established as the Territory of Utah. 9 Stat. 453. The constitution and laws of the United States were declared to be in force in the Territory "as far as may be applicable." On January 4, 1896, by Presidential Proclamation (No. 9), 28 Stat. 876, pursuant to the Utah Statehood Enabling Act of June 16, 1894, 28 Stat. 107, setting forth the conditions entitling the people of the Territory to become a State, that Territory was proclaimed a State and admitted into the Union "on an equal footing with the original States." At that time the United States was the owner in fee of all the uplands of the Lake, with the exception of those portions which it had transferred to private interests by patents prior to that time.

As set forth in the Memorandum of the United States, February 7, 1968, p. 1, "Before then, beginning in the 1850's, various portions of the lands adjoining Great Salt Lake have been surveyed, with a meander line approximating the shore of the Lake as it then existed. Although the level of the Lake has fluctuated over the years, its general trend has been downward. As a result, the meander lines, drawn for the most part years ago, are in some cases thousands of feet, and in other cases several miles, inland of the present waterline of the Lake. Ownership of the land, estimated to be 600,000 acres, known as relicted land, between the water's edge and the old meander line has been a source of dispute and is the principal subject matter of this controversy."

1. The State of Utah claims that on January 4, 1896, the date it was admitted to the Union, the Great Salt Lake

was a navigable body of water. On the basis of this fact and the "equal footing doctrine",[2] it asserts that it is the owner of the Lake's bed as delineated and determined by the official surveyed meander line and that the land (some 600,000 acres) left exposed by the recession of the Lake between the water's edge and the meander line, known as "public domain reliction", is part of that bed. By reason of its claim, the State of Utah, in addition to having sold some of that land, leases other portions of the land and grants licenses to extract minerals from the Lake to private interests.

2. The United States claims, excluding those exposed lands lakeward from the upland[3] transferred to patentees, title to a substantial portion (some 325,574 acres) of the

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2 Starting with the case of *Martin v. Waddell*, 16 Peters (41 U.S.) 367, 410 (1842), the Court said: "For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soil under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government. . . ." The case of *Pollard v. Hagan*, 3 How. (44 U.S.) 212, 229-230 (1845) announced the "equal footing" doctrine. The facts were as follows: Plaintiff, a patentee of the United States for the premises in question, brought an ejectment action in an Alabama State Court. The defendant in possession, who traced his title to a Spanish grant, offered evidence that the premises, between 1819 and 1823, were covered by waters of the Mobile River at common high tide. The Court charged the jury that if they believed the premises were below the "usual high water-mark" at the time Alabama was admitted into the union, then the patent could give no title. A verdict and judgment in favor of defendants was affirmed by the Supreme Court of Alabama. In affirming and holding that Congress had no power to grant to plaintiff the land in controversy, this Court stated the following propositions (44 U.S., at 230): "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." Also see *United States v. Utah*, 283 U.S. 64, 75 (1931), and cases therein cited in footnote 4.

3 Uplands are lots above and adjacent to the meander line.

exposed lands (known as "public domain reliction" lands) claimed by Utah as part of the Lake's bed. The basis for this claim is that it was the original owner of the uplands and for that reason it is entitled to the exposed lands under the common-law doctrine of reliction.[4]

3. Private vendees or patentees of the Lake's uplands whose interest can be traced to the United States claim all the land lakeward fronting such uplands. Their claims do not stop at the water's edge but continue to the thread of the Lake. They contend that the patents impliedly passed title to the relicted land to the owner of the adjoining uplands. The combined area of the exposed land claimed by this group amounts to approximately 275,000 acres. Morton is a good example of one of this group.

4. In addition, however, the United States also claims the relicted land fronting the uplands of some of the patentees (or those claiming through them) under the so-called Basart doctrine.[5] The total area claimed under this doctrine is approximately 108,780 acres, and is referred to as "public land reliction under Basart." These private owners, of course, disagree that the Basart doctrine is applicable to these lands.

5. Lessees of the State of Utah over relicted lands,[6] some of whom have acquired licenses and permits to extract

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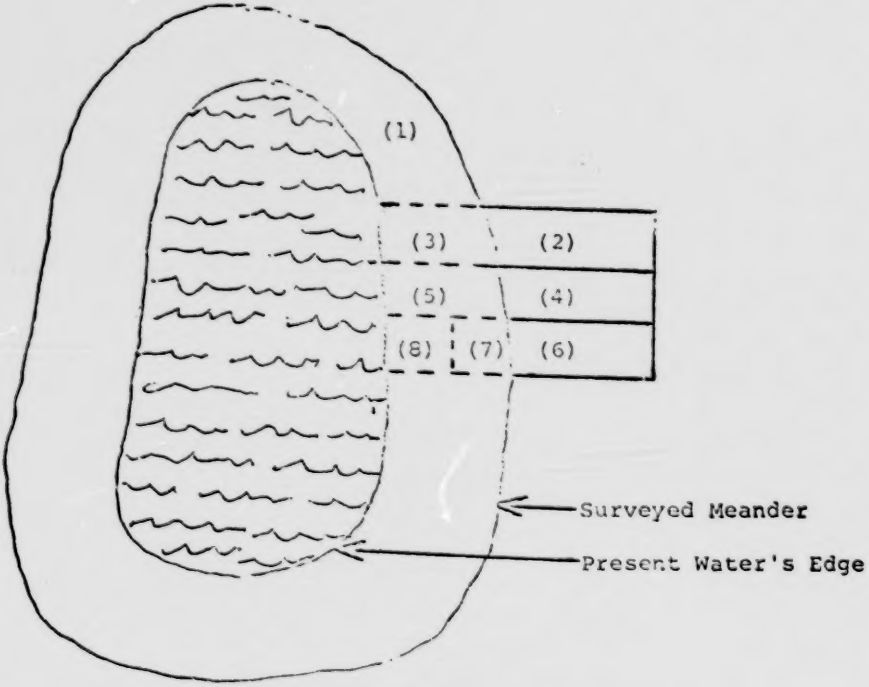
4 See *State of Utah*, 70 I.D. 27 (1963).

5 See *Madison v. Basart*, 59 I.D. 415 (1947), a case in which the United States Department of Interior ruled that where a substantial accretion had formed between the meander line and the shore line of the Missouri River at the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

6 By statute, the State of Utah provides that all mineral deposits, and salt and other minerals in navigable waters, are reserved to the state and shall be sold only upon a royalty basis. See 1967 Pocket Supp. to Replacement Vol. 7 Utah Code Ann. § 65-1-15.

ILLUSTRATIVE DIAGRAM



EXPLANATORY:

The various classifications of exposed land around the Great Salt Lake can be demonstrated by the numbered areas above as identified by the description of each area as set forth below. The estimated acreages are rough approximations, and the actual acreages would vary from day to day and from month to month with the fluctuating water level of the lake.

(1) Belt of approximately 600,000 acres of exposed land circling the lake, situated between present water's edge and surveyed meander line .

(2) Fee land where ownership retained by the United States.

(3) Claim of United States to 325,000 acres as direct reliction land.

(4) Fee land patented to private person when water's edge was at or near surveyed meander.

(5) Claim of private persons to 167,000 acres as direct reliction lands—not in issue in this litigation.

(6) Fee land patented to private person when water's edge was substantially below surveyed meander.

(7) Substantial land exposed at date of patent. Broken line between (7) and (8) represents water's edge at date of patent.

(8) Land exposed since date of patent. Total land in (7) and (8) combined represents about 108,000 acres, is claimed by both United States and private claimants, and is the only category of land which creates the indispensable party question.

[*Reproduced from the "Brief of State of Utah in Response to the Reply Brief of the United States, Etc."*]

the minerals from the Lake, would be expected to favor the State in a legal controversy over title to the lands and the minerals in solution. M & C Corporation is a good example of one of this group.

The exposed land in dispute is of little value except for ingress and egress to and from the Lake and for use in mineral extraction. It is the minerals and the brines in solution in the waters of the Lake which have a substantial value if the same can be extracted, processed and marketed. The State of Utah is anxious to establish a mineral extraction industry by private interests on the shores of the lake.[7] Such an industry cannot proceed to its fullest extent as long as a dispute between the United States and the State of Utah over title to the derelicted land exists.

Attempts to settle by legislation the controversy between the United States and the State of Utah resulted in the passage of the Act of June 3, 1966 (80 Stat. 192), heretofore referred to.

The Legislature of the State of Utah has "authorized and directed" the Governor of that State, "with the concurrence of the State land board to elect whether to litigate the conflicting claims of the United States and the State as to the bed of the lake or to accept and pay without litigation the fair market value fixed by the secretary of the interior without litigation." Act approved June 6, 1966 (2nd Spec. S.), ch. 11, § 5, 7 Utah Code Annotated (1953), § 65-95 (1967 Cum. Supp.).

On March 1, 1967, the Attorney General of the State of Utah filed in the Court a Motion for Leave to File a Complaint; the Complaint accompanied the Motion. The only defendant named in the Complaint is the United States of

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7 This interest has been asserted by the Legislature of the State of Utah. See 1967 Pocket Supp. to Replacement Vol. 7 Utah Code Ann. § 65-9-3.

America. On May 15, 1967, the Court granted the State of Utah's motion (387 U.S. 902), and on June 12, 1967, appointed me as Special Master. 388 U.S. 902.

On June 15, 1967, the United States is purported to have conveyed by quitclaim deed [8] all of its rights, title and interest to the land and the minerals in solution in the Lake to the State of Utah, but reserving the right to all minerals in the land together with the right to prospect for, mine and remove the same in the excluded land. (See §§ 2 and 3 of P.L. 89-441.)

On July 14, 1967, the United States filed an Answer to the State of Utah's Complaint.

On September 18, 1967, Morton filed its Motion for Leave to Intervene *as a party defendant* in the original action. Its proposed Answer to Utah's Complaint accompanied the motion. On October 23, 1967, the motion for leave to intervene and file an answer was referred to the Special Master. 389 U.S. 909. In November of 1967, the United States responded that it had no objection to the intervention of Morton in this action.

On or about January 24, 1968, M & C Corporation filed its motion for leave to intervene *as a party plaintiff*. Its proposed Complaint accompanied the motion. Thereafter, on or about February 18, 1968, M & C Corporation filed a Supplemental Motion to Intervene, in the alternative, as *a party defendant*. Its proposed Answer and Cross-claim accompanied the motion.

On or about March 11, 1968, the Court referred M & C Corporation's motion to the Special Master for a report and

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8 "A deed of conveyance operating by way of release; that is, intended to pass any title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title." Black's Law Dictionary (4th Ed.).

recommendation which is to also include Morton's motion. 390 U.S. 977.

Certain questions relating to intervention of Morton and M & C Corporation having been raised by the State of Utah, all counsel were requested by the Special Master to address themselves to certain issues.

On January 8, 1968, a hearing was held before me in the Attorney General's office, State Capitol Building, Salt Lake City, Utah. Present were: Martin Green for the Department of Justice; Phil L. Hansen, Richard L. Dewsnup, Dallin Jensen for the State of Utah; Frank A. Wollaeger, Martin Jacobs, Stephen B. Nebeker for Morton International; George E. Boss, Robert Thurman for Great Salt Lake Minerals and Chemicals Corporation.

On February 9, 1968, there was a hearing before me in the West Conference Room of the Supreme Court Building, Washington, D.C. In attendance were: Erwin N. Griswold, Solicitor General of the United States; Louis Claiborne, Assistant to the Solicitor General; Clyde O. Martz, Assistant Attorney General; David R. Warner, Chief, General Litigation Section; Martin Green, Department of Justice; Phil L. Hansen, Attorney General of the State of Utah; Richard Dewsnup, Special Assistant to the Attorney General of the State of Utah; Charles R. Hansen, Director, State Land Board; D. W. Jensen; Frank A. Wollaeger and Myer Feldman, Morton International, Inc., George E. Boss and William Rogers, Great Salt Lake Minerals and Chemicals Corporation; and Mr. Garner, Dow Chemical Company.

On March 29, 1968, after much argument and correspondence, the Attorney General of Utah and the Solicitor General of the United States agreed on a Stipulation (See Appendix, pp. 67-72, which they contend eliminates many of the issues raised by the would-be intervenors. In May of 1968, the parties filed a joint motion for leave to

file the Stipulation or to Amend the Complaint, and on June 3, 1968, the Court referred the joint motion to the Special Master. — U.S. —.

On April 26, 1968, a third hearing was held in Washington, D.C.

IV.

JURISDICTION OF THE ORIGINAL ACTION BETWEEN THE STATE OF UTAH AND THE UNITED STATES.

The judicial power that the people conferred on the Supreme Court and the federal judiciary which the Congress might ordain and establish from time to time is found in Article III, § 2, of the United States Constitution.

The original jurisdiction of the Court extends to actions by a state against the United States with the consent of Congress. *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *New Mexico v. Lane*, 243 U.S. 52 (1917); *Minnesota v. United States*, 305 U.S. 382, 387 (1939). Absent the consent of Congress the United States is immune from suit. *Kansas v. United States*, 204 U.S. 331, 341-342 (1907). This is an action by a State against the United States and in § 5 of Public Law 89-411 (S-265), 80 Stat. at 195, the Congress has given the consent of the United States to be joined as a defendant to an action before this Court.

The judicial power conferred by Article III, § 2, may be exercised only when a party asserts a claim ("case" or "controversy") in the form prescribed by, or acceptable to, the Court. See *Osborn v. United States Bank*, 9 Wheat. (22 U.S.) 737, 818 (1824).

Rule 9(2) of the Rules of the Supreme Court of the United States[9] adopted June 12, 1967, effective October 2, 1967 (388 U.S. 927-991), provides:

> "2. The form of pleadings and motions in original actions shall be governed, as far as may be, by the

9 The Supreme Court of the United States has the power, without further Act of Congress, to regulate the form and mode in which original actions shall proceed and be exercised. See *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793); *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 96-98 (1861).

Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court." (388 U.S., at 937)

This rule is applicable to this case even though it became effective after the State of Utah filed its motion for leave to file a complaint and entered an appearance. The rule is identical to its counterpart of the Rules promulgated April 12, 1954, effective July 1, 1954, 346 U.S. 955. Those rules have been rescinded. Rule 9(2) thereof has not been revised or amended in the interval between July 11, 1954, and October 2, 1967.

Rule 7 of the Rules of Civil Procedure lists the pleadings allowed and the form of motions, and Rule 8, thereof, provides for the general rules of pleading.

"Rule 8. General Rules of Pleading.

"(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * *

"(e) Pleading To Be Concise And Direct: Consistency.

"(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

"(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

. . . . . ."

We therefore look to the State of Utah's complaint.

(a) Summary of Allegations of Complaint.

This pleading, consisting of five numbered paragraphs and a prayer for relief, sworn to by the governor of the State, sets forth in its introductory part that the State of Utah, by its attorney general, brings this action "in equity" against the United States. The authority for the Court's jurisdiction appears in the first paragraph. In the second paragraph it is averred that the State of Utah and the United States are claiming ownership interest in the same land area, and that the United States consents to be sued in this action to determine what interest it has in the land area, and that the State has formally elected to maintain this action. A map, prepared by the United States Department of the Interior, and generally identifying the lands in question, is attached to the Complaint as Exhibit A. The legal and factual basis of the State of Utah's claim is set forth in the third paragraph. There it is averred that the Great Salt Lake, wholly within the State, has been a navigable body of water since January 4, 1896, and that the

official meander line represents the mean high-water mark of the Lake's bed as it existed at the date of survey and at the date of Utah's Statehood, and that by virtue of the navigability of the Lake and its admission into the Union on an equal footing with all other states, the State of Utah became the owner of the Lake's bed as delineated by the official surveyed meander line and all the minerals within the waters and bed of the Lake. The fourth paragraph declares that since Statehood, Utah has administered the land "constituting the bed of the Lake" and has invested millions of dollars in the development and improvement of it, and has granted leases covering, much of the land, and that the United States first asserted a claim to part of the land in 1959 even though it has recognized the State of Utah's title earlier by purchasing some of the land from the State prior to that time. The last paragraph asserts that the State of Utah has suffered irreparable injury as a result of the claims and actions of the United States and will continue to do so until such claims and actions cease. This is so, assertedly, because the minerals and brine in the waters of the Lake have a substantial value if they can be extracted, processed, and marketed, that it has issued a number of mineral leases and the mineral industry is important to the economy of the State, which industry requires the use of the exposed portions of the bed for the mineral extraction; that such industry cannot proceed until there is certainty of title to the exposed portions of the bed; and that the claims and actions of the United States have "impaired, hampered, frustrated and prevented" the State of Utah and its lessees from proceeding with mineral extraction, and cast a cloud on the ownership of the State as to all portions of the bed; and that "the State of Utah has no adequate remedy at law."

The prayer for relief asks for a decree quieting title in the State of Utah as against the United States regard-

ing the bed of the Lake and the minerals located therein, that the Court appoint a master to hear all admissible evidence and make findings and recommendations to the Court.[10]

(b) "Case" or "Controversy".

Article III, § 2, limits the exercise of the federal judicial power to "cases" and "controversies". See generally: *Osborn v. United States Bank*, 9 Wheat. 738, 819; *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-241 (1937); *Nashville C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249 (1933). In my opinion, the complaint presents a case or controversy within the meaning of the Constitution. *Minnesota v. Hitchcock*, supra, 185 U.S. at 382; *Texas v. Florida*, 306 U.S. 398, 406 (1939). Also see *United States v. Utah*, 283 U.S. 64, 75 (1931); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).

(c) Real Party in Interest.

The complaining state must be the real party in interest (*Kansas v. United States*, 204 U.S. 331 (1907)), and the Court will not permit the action to proceed when it appears that the complaining State is actually suing on behalf of private interests. *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Arkansas v. Texas*, 346 U.S. 368 (1953). From the record before me it appears that the State of Utah is the real party in interest in this action.

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10 "In its answer, the United States denied the State of Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that it is the owner of all right, title, and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is 'to have those lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended.' (Answer, p. 3)." See Morton's motion to intervene, p. 2.

V.

IS THIS AN ACTION WITHIN THE AUTHORITY OF PUBLIC LAW 89-441?

It is claimed that the Complaint of the State of Utah, as allegedly narrowed by the stipulation, does not meet the requirements of the type of action to which Congress gave consent to join the United States.

It was early recognized by the Court, "as the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some Act of Congress, or the court cannot exercise jurisdiction over it." *United States v. Clarke,* 8 Pet. (33 U.S. 276, 281) 436, 444 (1829).

(a) Interpretation of the Act.

(See Appendix, pp. 52-56.)

The intervenors contend that the consent of the United States to be joined in this action is dependent upon an adjudication of *all* (as opposed to some of) the right, title and interest of the United States to the lands below the Lake's meander line and the minerals in solution in the Lake. In pertinent part, § 2 of the Act provides:

> "Sec. 2. Subject to the other provisions of the Act, The Secretary of the Interior shall by quitclaim deed convey to the State of Utah *all* right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State . . . whether *such lands* now are or in the future may become uncovered by the recession of the waters of said Lake . . . ." (Emphasis supplied.)

By § 5 of the Act, the State of Utah is given an election between two alternatives. For our purposes they are:

> "The State—
>
> "(a) May request the Secretary of the Interior to determine the fair market value of *the lands* as of the date of the completed survey . . . or,
>
> . . . . . .
>
> "(b) May maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States *in lands* conveyed to the State of Utah pursuant to section 2 of the Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of the Act *as may be found by the court to have been the property of the United States prior to the conveyance.*" (Emphasis supplied.)

However, § 2 contains a provision which reads in part as follows:

> "That the provisions of this Act shall not effect (1) any *valid* existing rights or interest, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any lands within and below the meander line . . . ." (Emphasis added.)

When the entire Act is considered along with its purpose, the limited jurisdiction of the Court in original actions before it and sovereign immunity, it appears that the expression "to secure a judicial determination of the right, title and interest of the United States in lands conveyed to

the State of Utah pursuant to section 2 of the Act" appearing in § 5(b) thereof does not mean necessarily *all* the rights, title, and interest of the United States to the lands and minerals lying below the meander line of the Lake. With certain exceptions, not material here, Congress desired to divest the government of whatever proprietary interest it had in the land and minerals for a price equal to the fair market value thereof. Section 2 of the Act. To do so it would be necessary to establish the government's title, especially between it and the State of Utah, to those items. Congress chose to have this done by having the United States joined as a defendant in an original action brought by the State of Utah in this Court. We must assume that Congress was aware of the jurisdictional limitations regarding parties in original actions before the Court, that interested private parties could not be joined validly without the consent of the State, and that ordinarily controversies between the United States and private parties may not be litigated in this Court. To read into § 5(b) of the Act a requirement that *all* the rights, title, and interest of the United States in the lands and minerals must be decided in this litigation as a condition to the consent to join the United States as a party defendant is to attribute to Congress an ignorance of the Court's original jurisdiction. When Congress meant *all* it used the word "all" in § 2 of the Act; it did not repeat that word in § 5(b). Moreover, any litigation between the United States and the State of Utah may not validly directly effect adversely the rights of private parties not joined in the action. The Constitution requires this effect. In fact, the Act, by the proviso in § 2, recognizes this principle by providing that a decision of this Court or any other action taken pursuant to the Act shall have no direct bearing on the valid existing rights of third persons. The fact that the adjective "valid" pro-

cedes the words "existing rights or interests" does not mean that their legal soundness must be determined in this action before the consent to join the United States provision becomes operative. To adjudicate the validity of such "existing rights or interests" solely for the purpose of determining whether they are unaffected by action to be taken pursuant to the Act would be of no avail.

(b) Prayer for Relief in Original Complaint.

Paragraphs 1 and 3 of the prayer for relief of the State of Utah's complaint (pp. 11 and 12) read as follows:

"WHEREFORE, plaintiff prays:

"1. That a decree be entered by this Court quieting title in the State of Utah as against *any and all* claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest *whatsoever* to any part of said land or minerals located therein or *any* part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting *any* right, title or interest in or to any of said land or minerals or *any* part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

. . . . . .

"3. For such other and further relief as this Court may deem proper and necessary in these premises." (Emphasis added.)

The State of Utah may be granted only the relief to which it is entitled as against the United States, without affecting the rights and interests of third parties not joined in this action. Such relief is as broad as that contemplated by the Act and meets the requirement of the consent provision of § 5(b) to the Act.

(c) Effect of the Stipulation.

(See Appendix, pp. 69-72.)

Paragraph No. 1 of the Stipulation states that "the only object of the present suit is to determine whether, as against the United States, the State of Utah held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441." The object of the action, as stated in this paragraph, is only as broad as is permissible under the Act without the joinder of third parties. The prayer for relief in the Complaint could not validly ask for greater or wider relief, and hence this paragraph of the Stipulation makes explicit that which is implicit in the Complaint when read in connection with the Act, the jurisdictional limits of this Court and sovereign immunity from suit. So in effect this paragraph does not narrow the issues beyond the breadth required by the Act.

The second of two sentences in Paragraph No. 2 of the Stipulation provides:

> "In addition, the United States *reserves the right to assert* that it owned and conveyed to the State on June 15, 1967, all the brines and minerals in solution in the brines of the Great Salt Lake and all of the pres-

ently submerged lands underlying the Lake, and the State *reserves the right to contest the propriety of asserting such a claim in this litigation.*" (Emphasis added.)

Paragraph No. 3 of the Stipulation states:

"3. *Should* the United States assert that prior to June 15, 1967, it owned the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands underlying the Lake, and should the State fail to establish its own superior title as against the United States to these brines, minerals and submerged lands, *the State,* without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the lands uncovered and submerged) and brines and minerals described in paragraph 2 and *shall be bound to pay the United States the fair value of all such lands, brines and minerals in accordance with Public Law 89-441, or the conveyance thereof shall be null.*" (Emphasis added.)

The last sentence of Paragraph III of the Complaint states: "The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined." The Answer of the United States to this assertion is as follows: "The remaining allegations of Paragraph III are conclusions of law, premised for the most part upon the supposed navigability of the Great Salt Lake; such legal conclusions require no response in this Answer, and therefore are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied." In addition, the first sentence of Paragraph V of the Complaint avers: "The State of Utah owns

the minerals and brines included within the waters of the Great Salt Lake." The Answer of the United States to this averment is: "The allegation of the first sentence of Paragraph V of the Complaint is a conclusion of law, which requires no answer, and which, therefore, is neither admitted nor denied; but to the extent that it may be construed as an allegation of fact, it is denied."

However, the previously quoted portions of the Stipulation may be read to the effect that the State of Utah may carve out of this action the assertion that it owns the bed of the Lake and the minerals in solution without agreeing to pay for them, and leave that issue for adjudication at a later date. If that reading is the one the parties intend, then the Stipulation reduces the claim made in the Complaint. Ordinarily, a plaintiff is master of his complaint and may seek less than that to which he is entitled from the defendant. The State of Utah does not have such complete freedom in this action for it must meet the requirements of Public Law 89-441 before the Court may continue to proceed with the action. The United States, as the original fee owner of every lake and its bed in the State of Utah, is the source of all title thereto. If it owned the beds, the United States also owned the minerals in or over the beds. See *Deseret Livestock Co. v. Utah*, 110 U. 239, 171 P. 2d 401, 403 (1946). Unless some act was done on its behalf, pursuant to Congressional authority, to diminish that interest, title to them remains in the United States. It may well be that on June 15, 1967, the United States no longer had any valid claim to an ownership interest in the Lake's bed or the minerals in solution in the Lake, and any assertion of a valid one would be useless. Whatever interest the United States had on that date, Congress, it seems to me, desired to place the burden on the State of Utah to prove that its title in the Lake's bed was superior to that of the United States and have this Court judicially proclaim whether such

interest existed or not. Anything less, in my opinion, would not meet the conditions of § 5(b) of Public Law 89-441. That the State of Utah is agreeable to pay the United States for such lands and minerals on the basis described in the latter part of Paragraph 3 of the Stipulation has no bearing on the consent issue as regards the right of Utah to sue the United States.

What has been said of the State of Utah holds true for the United States regarding the legal position it must take in this action. Congress may define the conditions under which it will permit suit against the United States. See *Honda v. Clark,* 386 U.S. 484, 501 (1967). And "The United States Attorney General has been held to be without power to waive the sovereign immunity of the United States. *Stanley v. United States,* 162 U.S. 255, 269-70; cf. *United States v. Shaw,* 309 U.S. 495, 501." *Ford Co. v. Dept. of Treasury,* 323 U.S. 459, 469, n. 14 (1945). Consequently, the United States must oppose any assertion of a superior title by the State of Utah in the land and minerals, and this requires, additionally, the elimination of the word "Should" at the beginning of Paragraph 3. Further, there must be eliminated in the Stipulation the second sentence of Paragraph 2, as there can be no reservation of right in the United States of all brines and minerals in the Lake, but in conformity with the statute, the Stipulation must put the same in issue.

The remaining paragraphs of the Stipulation, even if we assume it amends the Complaint, would not narrow the claim made in the Complaint. That the State of Utah is asserting to bind itself, through its Attorney General, to pay the United States for certain property designated as "public land reliction under *Basart*" and waive any claims under Paragraph 8 of the Stipulation to the return of any payment made by it to the United States for that land does not offend Public Law 89-441.

(d) Recommendation.

The parties should be granted leave to file their Stipulation of March 29, 1968. With the omission of the second sentence of Paragraph 2 and the word "Should" in Paragraph 3 of the Stipulation, as adverted to heretofore, there is put in issue under it title to the brines and minerals in solution and there is no deferring of this issue to some later date. The State of Utah, therefore, must show it has superior title to the brines and minerals rather than the United States.

VI.

INTERVENTION.

Intervention in civil cases in the federal district courts is governed by Rule 24 of the Federal Rules of Civil Procedure. However, the mere compliance with the procedural requirements of this rule will not permit, for that reason alone, the intervention of Morton and M & C Corporation in this action.

(a) Motion of Morton.

According to the allegations under the second defense of its proposed Answer to the State of Utah's Complaint accompanying its motion to intervene as *a party defendant*, Morton is the owner of tracts of uplands of the Lake, having derived its titles from the United States by virtue of mesne conveyances, through patents granted by the United States under authority of Congressional Acts, including the Utah Statehood Enabling Act, and that these tracts are now, and have been at all times, riparian to the Lake. On the basis of Federal decisional law, it claims title to the land between the water's edge and meander lines fronting its respective uplands. It further claims that its title with respect to each tract extends to the thread of the Lake by reason of the fact that on the date of the State's admission to statehood, the Lake was not navigable. It asserts that these lands are also being claimed by the State of Utah and the United States in this action. The prayer for relief is as follows:

> "WHEREFORE, this defendant prays that a decree be entered by this Court:
>
> "(a) Confirming, declaring and establishing that this defendant is the owner of all right, title and inter-

est in all of said relicted and water covered lands described in paragraphs I, II and III of the Second Defense which constitutes a part of the lands described in Section 2 of the Act of June 3, 1966, as amended, and the minerals located therein;

"(b) Confirming, declaring and establishing that the State of Utah and the United States are without any right, title or interest in said relicted and water covered lands and the minerals located therein;

"(d) Declaring that any conveyance, pursuant to Section 2 of the Act of June 3, 1966, as amended, made by the United States to the State of Utah with respect to said relicted and water covered lands be null and void;

. . . . . ."

By its motion to intervene and its proposed answer Morton demonstrates that it is opposing the State of Utah's claim of title and is seeking affirmative relief against that State. And although it speaks out against the claim of the United States under the Basart doctrine, Morton has not sought leave to file a cross-claim against the United States.

Supplemental Motion of M & C Corporation.

In its proposed Answer to the State of Utah's Complaint accompanying its Supplemental Motion to intervene as *a party defendant*, M & C Corporation denies that the State of Utah owns the exposed lands which they allegedly own in fee which are adjacent to its uplands and very limited in amount and prays for a decree quieting its title to the exposed lands as against the claims of the State of Utah. In its proposed Cross-claim it claims title to the same exposed land by virtue of the common-law doctrine of

reliction and accretion, and that the United States wrongfully asserts title to those lands and threatens to dispossess it, and prays for a decree quieting its title to those lands as against the United States.

(b) Motions of M & C Corporation.

According to paragraph III of its proposed complaint accompanying its motion to intervene as *a party plaintiff*, M & C Corporation holds in fee certain real property adjacent to and upland of the meander line of the Lake and also holds certain leasehold interests and a royalty agreement from the State of Utah, which interests collectively give it the right to extract minerals from the Lake. Claiming no adequate remedy at law it prays for the following relief:

> "1. Declare that [it] has, as against the United States, the right to use and possess the portion of the Lake embraced in [its] leaseholds . . . under their existing terms and conditions;
>
> "2. To enjoin Defendant U.S. . . . from asserting any claim to said portion of the Land or otherwise interfering with or disturbing [its] quiet and peaceful enjoyment thereof;"

(c) Jurisdiction of the Court in Original Actions Before It.

In pertinent part, Article III, § 2, of the United States Constitution provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies between two or more States, between a State

> and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects."
>
> "In all Cases . . . in which a State shall be a party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellant jurisdiction, ..."

The Eleventh Amendment to the United States Constitution provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Thus the original jurisdiction of this Court is made dependent upon the character of the parties to a controversy, and the party or parties on one side must be a state or a number of states. But the party or parties on the other side of the case, citizen or citizens of another or opposing state, may not be joined to them as defendants, citizens of the same state which is bringing the action. *California v. Southern Pacific Co.*, 157 U.S. 229 (1895).

It is also clear that this Court does not have original jurisdiction over a controversy between a private corporation and the United States.

Since the would-be intervenors are deemed citizens of a state other than Utah, the Court would have original jurisdiction over an action brought by the State of Utah against either or both of them. *Pennsylvania v. Quicksilver Co.*, 10 Wall. (77 U.S.) 553 (1807); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

(1) Sovereign Immunity of a State From Suit.

It is stating the obvious to note that we must deal with at least one sovereign and are dealing with two in this action; and ordinarily they may not be sued without their consent. Although there is no express provision to that effect in the Constitution, except where the plan of that document involves the surrender of immunity from suit, the requirement of consent is necessarily implied. See *Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934). Also see *Hans v. Louisiana*, 134 U.S. 1, 11-12 (1889); *Parden v. Terminal R. Co.*, 377 U.S. 184, 191-198 (1964). "The evident purpose of the [Eleventh] Amendment, so promptly proposed and finally adopted was to prohibit all suits against a State, by or for citizens of other States, or aliens, *without the consent of the State to be sued* . . . ." (Emphasis added.) *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883).

(2) Waiver of Immunity From Suit by the State of Utah.

It is argued on behalf of the would-be intervenors that the State of Utah, by bringing this action against the United States to quiet title to the land and minerals, has tacitly consented to sue private persons claiming an interest in part of that land and minerals.

In contrast to that of the United States which requires a Congressional statute, a state may waive its immunity through its attorney general. As summarized in the opening paragraph of *Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275 (1959), the Court said: "When the Court in 1793 held that a State could be sued in the federal courts by a citizen of another State (*Chisholm v. Georgia*, 2 Dall. 419), the Eleventh Amendment was passed precluding it. But this is an immunity which a State may waive at its pleasure (*Missouri v. Fiske*, 290 U.S. 18, 24) as by a general appearance in litigation in a federal court (*Clark*

v. Banard, 108 U.S. 436, 447-448) or by statute. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 468-470. The conclusion that there has been a waiver of immunity will not be lightly inferred. *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171. Nor will waiver of immunity from suit in state courts do service for a waiver of immunity where the litigation is brought in the federal courts. Nor will waiver of immunity where the litigation is brought in the federal court. *Chandler v. Dix*, 194 U.S. 590, 591-592." (Footnotes omitted.)

The plan of the Constitution does not involve any surrender of sovereign immunity by the State of Utah from suit regarding this action. There are certain types of actions in which consent of the sovereign (or independent grounds of jurisdiction) are not a prerequisite to intervention. Examples are actions *in rem* (*Oklahoma v. Texas*, 258 U.S. 574, 581 (1922)), actions for claims against a fund in court (*Krippendorf v. Hyde*, 110 U.S. 276 (1884)), actions in the nature of an interpleader (*Texas v. Florida*, et al., 306 U.S. 398 (1939)), creditor's bill to set aside a fraudulent transaction (*Stewart v. Dunham*, 115 U.S. 61, 64 (1885)), and class actions.[11] But the action before the Court is not any of the types mentioned above.

The State of Utah has timely and appropriately raised the defense of sovereign immunity.[12] There is no automatic waiver simply because the sovereign institutes an action. In passing it may be noted that this Court, in

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11 The prerequisites to a class action and when they are maintainable are set forth in Rule 23 of the Federal Rules of Civil Procedure. However, the Court has cautioned: "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions." *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

12 See *Illinois Central R. Co. v. Adams*, 180 U.S. 28 (1901), holding, inter alia, that sovereign immunity of a state is a defense that must be raised by appropriate means or it will be deemed to have been waived.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513-514 (1939), said: "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity . . . . Consent alone gives jurisdiction to adjudge against a sovereign. Absent the consent, the attempted exercise of judicial power is void."

(A) *Public Law 89-441* (See Appendix, pp. 52-56).

I do not see anything in this Act supporting the argument that this action should include parties other than the two sovereigns. The fact that § 5(b) of the Act provides that "consent is given *to join* the United States as *a defendant* in this action." [13] does not require the joinder of others. It may be argued that since Congress did not add to the first part of the proviso of § 2 of the Act the words "unless joined in this action", no nongovernmental private party was to be joined. But the Court need not go that far. At most the adoption of the expressions "to join" and "a defendant", it seems to me, is a means of showing that Congress has no objection to the State of Utah seeking permission of the Court to sue or join, if it so desired, other defendants (at least governmental entities if any) in the action, and even envisioned that it might do so, within the Constitutional requirement.

That Congress was aware that not all private interests would be joined in this action is made plain by the proviso in § 2 which in substance states that the provisions of the Act shall not effect the rights of any person or nongovernmental entity in the lands below the meander line. The Act does not give private interests any rights in addition to those they had before, nor does it deprive them of any.

13 Emphasis added.

Due process of law would require this latter effect even though the Act did not in terms say so. See *Union Pacific R. Co. v. United States*, 99 U.S. 700, 720 (1879). A judgment in favor of either sovereign in this action will not validly bind the interests of private parties not joined. *United States v. Oregon*, 295 U.S. 1, 12 (1935); *Archer v. United States*, 268 F.2d 687, 690 (C.A. 10, 1959).

(B) *Section 78-11-9 of the Utah Judicial Code, 9 Utah Code Ann. (1953) § 78-11-9.*

Morton also argues that the State of Utah by virtue of Section 78-11-9 of the Utah Judicial Code 9 Utah Code Annotated (1953) § 78-11-9, has consented to its joinder in this action. The first of three sentences of this section provides:

> "State of Utah party defendant in certain suits.—Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved."

The State of Utah claims that this section of the Code has been repealed by the Utah Governmental Immunity Act, Sections 63-30-1 et seq., effective July 1, 1966. 7 Utah Code Annotated (1953) § 63-30-1 et seq. (1967 Replacement Pocket Supp.)

(C) *Utah Governmental Immunity Act.*

Section 63-30-6 of this Act provides:

"Waiver of Immunity as to actions involving property.—Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved."

Section 63-30-16 of the Act provides:

"Jurisdiction of district courts over actions.—Application of Rules of Civil Procedure.—The district courts shall have exclusive original jurisdiction over any action brought under this act and such actions shall be governed by the Utah Rules of Civil Procedure insofar as they are consistent with this act."

And Section 36 of the Act provides:

"Conflicting Statutes Repealed.

"All other acts or statutes in conflict with provisions of this act are repealed as of the effective date of this act."

There is no cross reference to Section 78-11-9 of the Utah Judicial Code in any of these sections of the Act.

"No Court of the State of Utah has held that § 78-11-9 has been repealed by implication. That State follows the general rule that repeal of a statute by implication is not favored by the courts and only occurs if the later statute is wholly irreconcilable with the former statute. *Moss v. Board of Commissioners of Salt Lake City,* 1 Utah 2d 60,

261 P.2d 961 (1953). Also, wherever possible, an earlier and later statute will be harmonized so that they can stand separately and both be given effect. *Nelden v. Clark,* 20 Utah 382, 59 P.524 (1899)." (See Morton's letter to Special Master, dated February 22, 1968, Appendix, pp. 73, at 74-75.)

Giving the would-be intervenors the benefit of any doubt, and assuming that § 78-11-9 has not been repealed, I fail to see how that section aids them here. In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such. As for § 63-30-16, it is part of the State's judicial code. Whatever its effect, it is not to be construed as granting the consent to sue private persons in the federal court or the authority to require that State to sue them. See *Chandler v. Dix,* 194 U.S. 590, 591-592 (1904), cited in *Petty v. Tennessee-Missouri Bridge Comm'n.,* supra, 359 U.S. at 276, and § 77 of the Utah Governmental Immunity Act providing that venue of actions under the Act shall be in the country where the cause of action arose or in Salt Lake County. 7 Utah Code Ann. (1953) § 63-30-17.

(3) Recommended Disposition of the Motions of the Would-Be Intervenors.

(1) Morton's motion should be denied on the ground that the State of Utah has not consented to sue that corporation in this action. If the motion is interpreted as also seeking leave to file a cross-claim against the United States, such motion should be denied for it would permit Morton to sue the United States without Constitutional authority.

(2) M & C Corporation's supplemental motion, to the extent that it seeks to intervene as a party defendant, should be denied for the same reason stated above in the first sentence.

(3) M & C Corporation's motion to intervene as a party plaintiff should be denied on the ground that this Court is without original jurisdiction to entertain a controversy between a private corporation and the United States even with the latter's consent.

(4) M & C Corporation's supplemental motion to intervene as a party defendant and file a cross-claim against the United States should also be denied for the reason stated in No. 3 above, and additionally, if it may not be a party, it may not file a cross-claim.

VII.

"INDISPENSABLE" PARTY ISSUE.

There is little dispute that the would-be intervenors meet the requirements of Rule 24(b)(2) of the Federal Rules of Civil Procedure.[14] The claim or defense of each one of them and the main action have a question of law or fact in common. Their intervention would not unduly delay or prejudice the adjudication of the rights of the original parties. Absent any jurisdictional or sovereign immunity bar, were this matter in the district court, a district judge would exercise his discretion and permit the would-be intervenors to intervene in the action.

The optimum solution, an adjudication of title to the land in question and the minerals in [illegible]ation that would be binding on all interested persons including Morton and M & C Corporation is not feasible here, because the State of Utah has not consented to sue or be sued by either one of the would-be intervenors. Additionally, there is no jurisdictional doorway through which Morton can enter for while it has not filed a cross-claim against the United States, by implication it is also suing the United States, since it has argued in its brief and at oral argument that it is contesting lands claimed by the United States. While

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14 Rule 24(b) provides: "(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

M & C Corporation has filed a cross-claim against the United States, neither it nor Morton has any constitutional authority to come into this court.

Therefore, the next question for the Court to decide: Is it equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of interested parties (Morton and M & C Corporation) who should be joined if it were feasible to do so. If it is not, the Court must dismiss the action.

It is clear that the Court should proceed to decide the case in the absence of Morton et al. and not dismiss.

Rule 19 of the Fed. R. Civ. Proc. provides:

> "Rule 19. *Joinder of Persons Needed for Just Adjudication.*
>
> "(a) PERSONS TO BE JOINED IF FEASIBLE. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk or incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If a person as described in sub-division (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The facts to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the pre-prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"(c) PLEADING REASONS FOR NONJOINDER. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

"(d) EXCEPTION OF CLASS ACTIONS. This rule is subject to the provisions of Rule 23."

In the leading case of *Provident Bank v. Patterson*, 390 U.S. 102 (1968), the Court said: "Rule 19(b) suggests four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled.[2] . . . First, the plaintiff has an interest in having a forum. Before trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists.[3] . . . Second, the defendant may properly wish to avoid multiple litigation, or inconsistent

relief, or sole responsibility for a liability he shares with another . . . .

"Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty.[5] It obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on non parties simply because they are not 'bound' in the technical sense.[6] Instead, as Rule 19(a) expresses it, the court must consider the extent to which the judgment 'as a practical matter impair or impede his ability to protect' his interest in the subject matter . . . .

"Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controveries. We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them . . . .

"Rule 19(b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests . . . ." (Footnotes omitted.) 390 U.S. at 109-111.

(a) Interest of the State of Utah.

The State claims all the land within the meander line and the minerals in and over the bed of the lake. Others claim an interest in that same land and minerals. The main adversary is the United States. If this action were

to be dismissed, the State of Utah would have no other forum to litigate the questions in this action against that adversary. Short of the State of Utah's withdrawing its claims to the above items and paying the fair market price for them, there is no other peaceable way other than this action in which Utah can eliminate the United States as a contender for those items. Congress has given consent to join the United States as a defendant in this action and this action only.

(b) Interest of the United States.

This party claims an interest in the minerals and title to a large portion of the relicted land. Part of this claim encompasses relicted land fronting uplands of patentees or those claiming through them. Under the present law, any party claiming adversely to the United States could not contest the latter's claim in a court, Federal or state, unless he were sued by the United States or the latter was violating his constitutional rights regarding such claims.[15] On the other hand, the United States, if it had elected to do so through its highest legal officer, could have brought an action similar to the one presently before the Court in (1) this Court,[16] (2) the United States District Court for the District of Utah, Northern Division,[17] or (3) a Utah

15 Morton has filed an action against the State of Utah and various of its officials and others in the United States District Court for the District of Utah (Civil Action No. C-127-66) alleging that the State has taken and deprived it of property (lands lying below the meander line of the Lake) without due process of law in violation of the Fourteenth Amendment to the Constitution (See Motion of Morton to Intervene as a defendant, and Answer, pp. 9-10, n. 5.) This is another possible reason why Morton has not sought leave to file a complaint in an original action before this Court which they might have done had Utah given its consent.

16 *United States v. Texas*, 143 U.S. 621 (1892).

17 Title 28, U.S.C. § 1345, which in part provides: "The district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . ."; *United States v. California*, 328 F.2d 729 (C.A.9, 1964), cert. denied, 379 U.S. 817.

State Court at least prior to July 1, 1966.[18]

It appears to be of no legal consequence under this heading whether this action was commenced either by the State of Utah or the United States. If the latter had brought the action, it would have lost a tactical advantage. That is, the burden of proof would have been upon it instead of the State of Utah as it will be in this action. The consent of the United States to sell whatever interest it had in the land and minerals to the State of Utah at a price equal to the fair market value of those items is to be considered a sufficient prid pro quo for Utah to have initiated the action here. However, even if the United States had taken the initiative here, the would-be intervenors would have been in no better position than they are now as to intervention.

If the United States had brought an action similar to the one before the Court against the State of Utah in the United States District Court for the District of Utah, Northern Division, it likewise would have lost the tactical advantage regarding the burden of proof. There, however, assuming that proper service could be had on them, there would be no jurisdictional obstacle to suing those claiming land which the United States also claims under the *Basart* doctrine along with those claiming through the State of Utah. But upland-fee owners claiming title through the United States would not be permitted to litigate their claims against the State of Utah without its consent. Thus they, in such a case, would be in no better position then they are now. The loss of the tactical advantage as to the burden of proof which the State of Utah would have had in such an

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18 Section 21 of the Utah Governmental Immunity Act, effective July 1, 1966, provides: "*Claims by other governmental entities.*—Notwithstanding any other provision of this act, no claim hereunder shall be brought by the United States or by any other state, territory, nation or governmental entity." L. 1965, ch. 139, § 21, 7 Utah Code Ann. (1953) 63-30-21.

action is compensated by the agreement in Public Law 89-441, as amended.

If the outcome of this action depends, alternatively or otherwise, on the issue of navigability of the Lake, then it would have been futile for the United States to have sued the State of Utah in its own Courts. In *Deseret Livestock Co. v. Utah*, supra, 110 U. 239, 171 P.2d 401, 403 (1946), the Supreme Court of Utah said that the "court will take judicial knowledge of the fact that Great Salt Lake is a navigable body of water and that it contains about 22 per cent salt in solution therein." and that "the state as the owner of the beds of navigable bodies of water is entitled to all valuable minerals in or on them."

(c) Interest of Absent Persons Who Should Be Joined.

(1) Morton: This corporation's sole interest in the subject matter of this action is a common question of law and fact. Without the consent of the sovereign, there is no forum in which Morton may go to litigate those questions of law and fact absent the interference of either sovereign with Morton's quiet enjoyment of the relicted land fronting its uplands. That this is so is no fault of the Court. In any event, Morton is in no wise worse off now than before this action was instituted.

The State of Utah's claim is being resisted by the United States, which is being represented by the second highest judicial officer in the country. In the absence of any allegations of bad faith or gross negligence on his part and clear proof of same, Morton's position will be adequately advanced by the United States in its case and it will adequately represent the interest of that corporation and all private persons similarly situated. For example, see: *MacDonald v. United States*, 119 F.2d 821 (C.A.9, 1941).

(2) M & C Corporation: As far as its leasing, licensing and royalty rights may be affected, this corporation has no real concern whether the State of Utah or the United States is declared the winner in this action. For no matter in which sovereign's favor this Court decides, the legal relationship between the State and M & C Corporation will remain as before. Even if this were not so, it cannot be said at this juncture that, with the highest judicial officer of the State of Utah resisting the claim of the United States, M & C Corporation's interest in the outcome would not be adequately represented in this action.

Regarding its interest stemming from upland fee holdings, this corporation is in no better position than Morton on the issue of "indispensable" Parties. Therefore, what has been said about Morton applies with equal force to M & C Corporation.

(d) Interest of the Public and the Courts.

Without elaboration, the public and the courts have an interest in having the question of title over the relicted land decided. If it cannot be done as to all the persons in interest—at least a start in having it decided should be made. The matter is here. The Court should not lose the opportunity to get the ball rolling at least. Deciding the matter as between the State of Utah and the United States will be a big step in that direction.

(e) Recommendation.

But even if Morton et al. had a more direct interest in the subject matter of this litigation, the interest of the State of Utah and, incidentally, the United States, the public and the courts in having this litigation completed far outweigh that of the private corporations to intervene herein.

From the foregoing, in my opinion, it is equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of Morton and M & C Corporation. It is therefore submitted that this Court not dismiss the action on "indispensable" party grounds and permit the State of Utah and the United States to proceed to the merits of this action.

VIII.

SHOULD THIS COURT EXERCISE ORIGINAL JURISDICTION OVER THE ACTION BETWEEN THE STATE OF UTAH AND THE UNITED STATES?

In the case of *Georgia v. Pennsylvania,* 324 U.S. 439, 464 (1945), the Court said: "It does not necessarily follow that the Court must exercise its original jurisdiction. It has at times been held that this Court is not the appropriate tribunal in which to maintain suits brought by a State. . . . The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." (Citations omitted.) Also see Stern and Gressman, Supreme Court Practice (3rd ed.) § 9-7.

The discussion under this heading overlaps that under (a) and (b) of Topic VII, regarding the interest of the State of Utah and the United States under the "Indispensable" party issue. For the reasons there stated, the State of Utah should not be penalized because the United States had not brought the action earlier either in this Court or in the United States District Court for the District of Utah, Northern Division.

(a) Recommendation.

Accordingly, in my opinion, the Court should not refuse to exercise jurisdiction over this action, and the motions of Morton International, Inc., and Great Salt Lake Minerals & Chemicals Corporation should be denied.

Respectfully submitted,

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

Appendix.

RELEVANT DOCKET ENTRIES.

Mar. 1, 1967. Motion for leave to file bill of complaint filed.

May 1, 1967. Response to motion for leave to file complaint filed.

May 3, 1967. Motion for leave to file bill of complaint distributed.

May 15, 1967. Motion for leave to file bill of complaint granted and the United States is allowed sixty days to answer.

Jun. 5, 1967. Appointment of Special Master distributed.

Jun. 12, 1967. Ordered that the Honorable J. Cullen Ganey, Senior Judge of the United States Court of Appeals for the Third Circuit be; and he is hereby appointed Special Master in this case. See ORDER.

Jun. 15, 1967. Oath of Special Master filed.

Jul. 14, 1967. Answer filed.

Sept. 18, 1967. Motion of Morton International, Inc. to intervene as defendant and file answer filed.

Oct. 11, 1967. Above Motion distributed.

Oct. 23, 1967. Motion of Morton International, Inc., for leave to intervene and file answer is referred to Special Master. Marshall, J., OUT.
Counsel for Morton International: Martin Jacobs, Myer Feldman, L. M. McBride, Frank A. Wollaeger.

Jan. 25, 1968. Brief of the State of Utah in opposition to motion by Morton International, Inc. for leave to intervene and answer filed.

Jan. 26, 1968. Motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a plaintiff, and its complaint filed.

Feb. 5, 1968. Reply brief of Morton International, Inc. to brief of State of Utah in opposition to motion of Morton International, Inc. for leave to intervene, filed.

Feb. 7, 1968. Motion of Great Lake Minerals & Chemicals Corporation for leave to intervene distributed.

Feb. 15, 1968. Joint motion for order directing manner of payment of Special Master's expenses filed. (NP)

Feb. 19, 1968. Supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a defendant, and its answer and cross claim filed.

Feb. 20, 1968. Memorandum for United States filed.

Feb. 20, 1968. Reply memorandum for United States filed.

Feb. 21, 1968. Supplemental motion of Great Salt Lake Minerals & Chemical Corporation to intervene as a defendant, and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Feb. 21, 1968. Memorandum for U. S. in response to motion and amended motion of Great Salt Lake Minerals & Chemicals Corporation filed.

Feb. 24, 1968. Brief of the State of Utah in response to reply brief of United States, etc.

Mar. 5, 1968. Motion of Great Lake Minerals & Chemicals Corp. for leave to intervene distributed. Also supplemental motion of Great Salt Lake Minerals & Chemicals Corp. to intervene as a defendant and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Mar. 11, 1968. Joint motion for order directing manner of payment of Special Master's expenses *withdrawn.*

Mar. 11, 1968. Motions of the Great Salt Lake Minerals & Chemicals Corp. for leave to intervene as a plaintiff and to intervene, in the alternative, as a defendant, together with its answer and cross claim are referred to the Special Master for a report and recommendation. Such report and recommendation shall also include the motion of the Morton International, Inc., for leave to intervene heretofore referred to the Special Master, Marshall, J., OUT.

Apr. 16, 1968. Brief of Morton International, Inc. in response to stipulation and supplemental memorandum for the United States filed.

Apr. 17, 1968. Memorandum of Great Salt Lake Minerals & Chemicals Corp. regarding Stipulation between U. S. and State of Utah filed.

Apr. 22, 1968. Supplemental memorandum for U. S. and stipulation filed.

May 17, 1968. Joint motion for leave to file stipulation filed.

May 20, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Morton International, Inc., filed.

May 21, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Great Salt Lake Minerals & Chemicals Corp. filed.

May 22, 1968. Joint motion for leave to file stipulation distributed.

Jun. 3, 1968. Joint motion for leave to file a stipulation, etc., referred to Special Master. Marshall, J., OUT.

STATUTE INVOLVED.

PUBLIC LAW 89-441
June 3, 1966 [S. 265]

AN ACT

To authorize conveyance of certain lands to the State of Utah based upon fair market value.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall within six months of the date of the passage of this Act complete the public land survey around the Great Salt Lake in the State of Utah by closing the meander line of that Lake, following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed area.

SEC. 2. Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: *Provided, however,* That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, or (2) any lands within the Bear River Migratory Bird Refuge and the Weber Basin Federal reclamation project.

Such conveyance shall be made when the survey required by section 1 has been completed and the agreement required by section 6 has been made.

SEC. 3. The conveyance authorized by this Act shall contain an express reservation to the United States of all minerals, except brines and minerals in solution in the brines, or precipitated or extracted therefrom in whatever Federal lands there may be below the meander line of Great Salt Lake, together with the right to prospect for, mine, and remove the same. The minerals thus reserved shall thereupon be withdrawn from appropriation under the public land laws of the United States, including the mining laws, but said minerals, in the discretion of the Secretary of the Interior, may be disposed of under any of the provisions of the mineral leasing laws that he deems appropriate: *Provided,* That any such lease shall not be inconsistent, as determined by the Secretary of the Interior, with the other uses of said lands by the State of Utah, its grantees, lessees, or permittees.

SEC. 4. As a condition of the conveyance authorized in this Act, and in consideration thereof, the State of Utah shall, (a) upon the express authority of an Act of its legislature, convey to the United States by quitclaim deed all of its rights, title, and interest in lands upland from the meander line, which lands the State may claim against the United States by reason of said lands having been, or hereafter becoming, submerged by the waters of Great Salt Lake, and (b) pay to the Secretary of the Interior the fair market value, as determined by the Secretary, of the lands (including any minerals) conveyed to it pursuant to section 2 of this Act. The Secretary of the Interior, after consultation with the State of Utah, may accept in payment in behalf of the United States, in lieu of money only, interests in lands, interests in mineral rights, includ-

ing those beneath the lakebed, the relinquishment of land selection rights, or any combination thereof equal to the fair market value.

SEC. 5. Within nine months after the date of enactment of this Act the State of Utah shall elect one of the alternatives set out in subsection (a) or subsection (b) of this section, and a failure so to elect shall render null and void any conveyance pursuant to this Act. The State—

(a) may request the Secretary of the Interior to determine the fair market value of the lands as of the date of the completed survey:

(1) In reaching a determination of the fair market value as of that time, the Secretary shall make a comprehensive study of the lands and minerals which are the subject of this Act;

(2) Nothing in this section shall be deemed to limit or prevent the Secretary from giving consideration to all factors he deems pertinent to an equitable resolution of the question of the proper consideration to be paid by the State of Utah to the United States for such lands;

(3) The Secretary shall transmit his value determination to the Government of the State of Utah not later than two years after he receives the request referred to above in this subsection. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void; or

(b) may maintain an action in the Supreme Court of the United States to secure a judicial determination

of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act as may be found by the court to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void.

SEC. 6. Pending resolution of the amount and manner of compensation to be paid by the State of Utah to the United States as provided herein, the State of Utah is authorized after making the agreement required by this section to issue permits, licenses, and leases covering such of these lands as the State deems necessary or appropriate to further the development of the water and mineral resources of the Great Salt Lake, or for other purposes. The State of Utah, by or pursuant to an express act of its legislature, shall agree to assume the obligation to administer the lands, for the purposes set forth above, in the manner of a trustee and any proceeds derived by the State of Utah therefrom shall be paid to the United States, until compensation for the full value of said lands as herein provided is made. Such proceeds paid to the United States shall be to the credit of the State of Utah as part of the compensation for which provision is made herein. If the question of the title to the United States is litigated as authorized by section 5(b) of this Act, and it is determined

that the United States has no right, title, or interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest.

In the event the conveyance authorized by section 2 of this Act becomes null and void, then any valid permits, licenses, and leases issued by the State under authority of this section, shall be deemed permits, licenses, and leases of the United States and shall be administered by the Secretary in accordance with the terms and provisions thereof.

Approved June 3, 1966.

PUBLIC LAW 89-542

August 23, 1966 [S. 3484]

An Act

To amend the Act of June 3, 1966 (Public Law 89-441, 80 Stat. 192), relating to the Great Salt Lake relicted lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 6 of the Act of June 3, 1966 (Public Law 89-441, 80 Stat. 192), is amended by changing the period at the end of the section to a comma and adding the following: "excepting for land rental rates which rates shall be subject to change based upon fair rental value as determined by the Secretary of the Interior and shall be subject to review and appropriate modification not less frequently than every five years by the Secretary of the Interior in accordance with rules and regulations of the Department of the Interior."

Approved August 23, 1966.

COMPLAINT.

The State of Utah, by its Attorney General, brings this suit in equity against the United States of America, and for its cause of action alleges:

I.

[1] The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, and the United States of America has consented to be sued in this Court in this action by virtue of Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542.

II.

[1] The State of Utah owns certain lands, hereinafter more fully identified, in which the United States of America claims an ownership interest contrary and opposed to the ownership of the State of Utah. Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542, granted the consent of

ANSWER.

I.

[1] The defendant admits the allegations of Paragraph I of the Complaint.

II.

[1] The defendant denies the allegation of the first sentence of Paragraph II of the Complaint that the State of Utah owns the lands which are the subject of this suit. [2] The defendant admits the remaining allegations in Paragraph II.

Complaint

the United States of America to be sued in this action to determine what interest, if any, the United States of America actually owned in and to said lands. [2] Said act authorized the State of Utah either to purchase the ownership interest claimed by the United States of America or to maintain an original action in this Court to determine whether the United States of America actually had any ownership interest. The State of Utah has formally determined and elected to maintain this action in this Court.

III.

[1] The Great Salt Lake is a navigable body of water located wholly within the State of Utah. The Great Salt Lake was navigable on January 4, 1896, when the State of Utah was admitted into the Union of the United States of America; it has at all times since been navigable; and it now is a navigable body of water. [2] The fact of navigability was

Answer

III.

[1] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the first two sentences of Paragraph III of the Complaint that the Great Salt Lake is a navigable body of water. [2] The remaining allegations of Paragraph III are conclusions of law, premised for the most part upon the sup-

Complaint

recognized by Congress in the enactment of Public Law 89-441, 80 Stat. 192, as amended by Public Law 89-542. The fact of navigability has been recognized further by the United States of America in its claim to the lands which are the subject of the instant litigation. At the date of statehood, by virtue of its admission into the Union on an equal footing with all other states, the State of Utah became the owner in a sovereign and proprietary capacity of the beds of all navigable lakes and streams located within the State of Utah. Therefore, at the date of statehood, by virtue of its admission into the Union on an equal footing with all other states, the State of Utah became the owner, has ever since been the owner, and now is the owner of the absolute right to the bed of the Great Salt Lake as delineated and determined by the official surveyed meander line of the Great Salt Lake, which meander line repre-

Answer

posed navigability of the Great Salt Lake; such legal conclusions require no response in this Answer, and therefore are neither admitted nor denied, but to the extent that they may be construed as allegations of fact, they are denied.

Complaint	*Answer*
sents the mean high water mark of said lake as it existed at date of survey and as it existed at the date of statehood. The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined.	
IV.	IV.
[1] The State of Utah has at all times since the date of statehood managed and administered the lands constituting the bed of the Great Salt Lake located below the surveyed meander line. The State of Utah has invested many millions of dollars in the development and improvement of much of the land constituting the bed of the Great Salt Lake. Further, the State of Utah has issued agricultural, mineral, and other leases covering much of said land. [2] The unqualified ownership of the State of Utah in and to these lands has been generally	[1] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first three sentences of Paragraph IV of the Complaint. [2] The defendant denies the allegations of the fourth and fifth sentences of Paragraph IV of the Complaint. [3] The defendant admits the truth of the allegation of the sixth sentence of Paragraph IV. [4] The defendant denies the allegations of the seventh and eighth sentences of Paragraph IV. [5] The defendant admits the allegations of all of the remaining

Complaint

recognized and undisputed. The United States of America itself has recognized such ownership in the State of Utah for more than 65 years. [3] In fact, the United States of America itself has purchased from and paid the State of Utah for certain of the lands constituting a part of the bed of the Great Salt Lake. [4] The United States of America first asserted in 1959 a claim to part of the land owned by the State of Utah located below the surveyed meander line of the Great Salt Lake and constituting a part of the bed of the Great Salt Lake. The United States of America had fully recognized title in the State of Utah prior to that time. [5] The State of Utah believes that the United States of America now claims to own approximately 436,000 acres of the bed of the Great Salt Lake. Since these lake beds lands are unsurveyed, it is not possible to describe by metes and bounds the land in dispute. However, said lands are gen-

Answer

sentences of Paragraph IV, [6] except for the thirteenth, as to which defendant denies plaintiff's claim of ownership, and [7] the last (the fourteenth), which the defendant denies in its entirety.

Complaint	*Answer*
erally identified on a map prepared by the United States of America which purports to show those areas which are claimed by the United States of America. Said map is marked Exhibit A, attached hereto, at pp. 14 and 15, and by this reference made a part of this complaint. [6] The claim of ownership of these lands by the United States of America is adverse to the ownership of the State of Utah. [7] In fact, the United States of America has no right, title, or interest in or to any of the lands illustrated in Exhibit A or to any other part of the bed of the Great Salt Lake as located below and within the surveyed meander line.	
V.	V.
[1] The State of Utah owns the minerals and brines included within the waters of the Great Salt Lake. Said minerals and brines have a substantial value if the same can be extracted, processed, and marketed. [2] The State	[1] The allegation of the first sentence of Paragraph V of the Complaint is a conclusion of law, which requires no answer, and which, therefore, is neither admitted nor denied; but to the extent that it may be con-

Complaint

of Utah has issued a number of mineral leases to lessees who are able and anxious to establish a mineral industry around the Great Salt Lake. [3] Such an industry is vitally important to the economy and interests of the State of Utah. This mineral development requires the use of the exposed portions of the bed of the Great Salt Lake for settling ponds and for other uses incidental to the mineral extraction industry. The mineral extraction industry cannot proceed until there is certainty of title as to the exposed portions of the bed of the Great Salt Lake. The exposed lands constituting a part of the bed of the Great Salt Lake have no significant inherent value, but they are vital to the State of Utah for use in connection with said mineral extraction from the waters and brines of the Great Salt Lake. The claims and actions of the United States of America have impaired, hampered, frus-

Answer

strued as an allegation of fact, it is denied. [2] The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of the second sentence of Paragraph V of the Complaint. [3] The remaining allegations of Paragraph V are merely argumentative, and do not require an answer, but to the extent that they may be construed as allegations of fact, they are denied.

Complaint

trated, and prevented the State of Utah and its lessees from proceeding with the mineral extraction industry; the claims and actions of the United States of America further have cast serious clouds on the water fowl management areas and other developed portions of the bed of the Great Salt Lake now owned and managed by the State of Utah; and the claims and actions of the United States of America still further have cast a cloud on the ownership of the State of Utah as to all portions of the bed of the Great Salt Lake illustrated in Exhibit A. The State of Utah has suffered irreparable injury as a result of said claims and actions by the United States of America and will continue to suffer irreparable injury until such claims and actions by the United States of America cease. The State of Utah has no adequate remedy at law.

Answer

Complaint

WHEREFORE, plaintiff prays:

1. That a decree be entered by this Court quieting title in the State of Utah as against any and all claims of the United States of America to the bed of the Great Salt Lake located within and below the official surveyed meander line of said lake; specifically declaring that the United States of America has no right, title, or interest whatsoever to any part of said land or minerals located therein or any part thereof, with the exception of the lands legally purchased and acquired by the United States of America from the State of Utah; and perpetually enjoining the United States of America from further asserting any right,

Answer

VI.

The defendant denies each and every allegation of the Complaint not specifically admitted, denied, or qualified herein.

WHEREFORE, having fully answered, the defendant prays this Court to confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

Complaint *Answer*

title, or interest in or to any of said land or minerals or any part thereof and from interfering with the possession, management, or development of said land by the State of Utah.

2. That this Court appoint a master to hear and consider all admissible evidence relating to the claims of ownership and to make his findings and recommendations to this Court.

3. For such other and further relief as this Court may deem proper and necessary in these premises.

.....

Phil L. Hansen
Attorney General
of Utah
Counsel for
Plaintiff
236 State Capitol
Building
Salt Lake City,
Utah

Complaint *Answer*

State of Utah
County of Salt Lake } ss

Calvin L Rampton, first being duly sworn upon his oath, deposes and says that he is the duly elected, qualified, and acting Governor of the State of Utah; that he has read the contents of the foregoing complaint; that the same are true of his own knowledge, except as to those matters alleged therein on information and belief; that as to those, he believes the same to be true.

.....
Calvin L. Rampton
Governor of Utah

Subscribed and sworn to before me this 27th day of February, 1967.

.....
Clyde L. Miller
Secretary of State
of Utah

CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of the State of Utah, counsel for plaintiff, and a member of the bar of this Court, hereby certify, in accordance with Rule 33(b) of the rules of this Court, that five copies of the foregoing motion for leave to file complaint and complaint were personally served upon the Solicitor General of the United States of America, Department of Justice, Washington 25, D.C., counsel for defendant United States of America, by having same delivered to his office, strictly in accordance with the requirements of Rule 33 (1) and (2) of the rules of this court, this 1st day of March, 1967.

.....

Phil L. Hansen
Attorney General
of Utah
Counsel for
Plaintiff
236 State Capitol
Building
Salt Lake City,
Utah

STIPULATION.

The State of Utah and the United States agree and stipulate as follows:

1. Notwithstanding anything to the contrary in the Complaint filed herein by the State of Utah or the Answer filed by the United States, the only objective of the present suit is to determine whether, as against the United States, the State held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441.

2. The presently uncovered lands which the United States claims to have owned and conveyed to the State on June 15, 1967, are correctly shown on the attached map, and comprise approximately 325,574 acres indicated as "public domain reliction" and approximately 108,780 acres indicated as "public land reliction under *Basart.*" In addition, the United States reserves the right to assert that it owned and conveyed to the State on June 15, 1967, all the brines and minerals in solution in the brines of the Great Salt Lake and all of the presently submerged lands underlying the Lake, and the State reserves the right to contest the propriety of asserting such a claim in this litigation.

3. Should the United States assert that prior to June 15, 1967, it owned the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands underlying the Lake, and should the State fail to establish its own superior title as against the United States to these brines, minerals and submerged lands, the

State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the lands (uncovered and submerged) and brines and minerals described in paragraph 2 and shall be bound to pay the United States the fair value of all such lands, brines and minerals in accordance with Public Law 89-441, or the conveyance thereof shall be null.

4. Should the State establish its own superior title as against the United States to the brines and minerals in solution in the brines of the Great Salt Lake and the presently submerged lands of the Lake, but fail to establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the State, without further contest in this or any other proceeding, shall acknowledge the title of the United States prior to the conveyance of June 15, 1967, to all the uncovered lands described in paragraph 2 (including those designated as "public domain reliction" and those designated as "public land reliction under *Basart*" on the attached map) and shall be bound to pay the United States the fair value of all such uncovered lands in accordance with Public Law 89-441, or the conveyance thereof shall be null.

5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as "public domain reliction lands," the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership prior to June 15, 1967, of the uncovered lands indicated on the attached map as "public land reliction under *Basart*," and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441.

6. In no event shall the judgment herein be taken as adjudicating or affecting the title of persons or corporations claiming lands (uncovered or submerged), brines or minerals below the meander line of the Great Salt Lake, whether those which the United States claims to have owned prior to June 15, 1967, or others; nor shall the conveyance of June 15, 1967, from the United States to the State or any subsequent payment by the State to the United States affect the validity of such claims.

7. Neither this stipulation nor the judgment herein shall affect title to the minerals reserved to the United States by Section 3 of Public Law 89-441 and excepted from the conveyance of June 15, 1967, executed pursuant thereto.

8. The State expressly waives any claim to the return of any payment made to the United States pursuant to Public Law 89-441 for lands (uncovered or submerged), brines or minerals conveyed to the State on June 15, 1967, should it be determined in subsequent proceedings that such lands, brines or minerals were owned by others and not the United States; and although the State and the United States believe that any payment so made will be the property of the United States and will not be subject to any claim by any other person, the State agrees to indemnify the United States should it be adjudicated to be liable to any claimant with respect to any such payment on the ground that the United States was not the true owner of such lands, brines or minerals on the date of the conveyance.

9. This stipulation is for the purpose of identifying, clarifying and limiting the scope of the present litigation and any judgment or decree entered herein, and shall not be construed to alter the burden of proof or the burden

of proceeding with the evidence otherwise attributable to either party in asserting its respective claims and defenses against the other.

PHIL L. HANSEN,
Attorney General,
State of Utah.

ERWIN N. GRISWOLD,
Solicitor General,
United States of America.

MARCH 1968.

(Letterhead of)

Mc Bride, Baker, Wienke & Schlosser
110 North Wacker Drive
Chicago, Illinois 60606

February 22, 1968

Honorable J. Cullen Ganey
Senior United States Circuit Judge
United States Court of Appeals
for the Third Circuit
3030 United States Courthouse
Philadelphia, Pennsylvania 19107

Dear Judge Ganey:

Re: *State of Utah v. United States of America*
No. 31, Original—October Term, 1967
Supreme Court of the United States

During that portion of the hearing on February 9, 1968 relating to Utah's claim of sovereign immunity in opposition to Morton's motion to intervene, Mr. Hansen stated that the consent statute, Section 78-11-9, Utah Code Annotated, cited by us at page 11 of Morton's reply brief, had been repealed effective July 1, 1966.

Although, for the reasons stated in our brief and argument, we do not rely primarily on this consent statute because it is clear under case law that the doctrine of sovereign immunity does not apply in this situation, we were surprised at Mr. Hansen's statement. Accordingly, we requested our Utah counsel to check the matter again and we have been advised that, contrary to the Attorney General's statement, Section 78-11-9 has not been expressly repealed by the Utah Legislature and remains on the statute books.

We, therefore, adhere to the position set forth in our brief that, even if consent were necessary, Utah by Section 78-11-9 has consented to any adverse claim by Morton in this action.

Apparently, Mr. Hansen made this statement on the theory that Section 78-11-9 was repealed by *implication* by the Governmental Immunity Act, Section 63-30-1, et seq., Utah Code Annotated, effective July 1, 1966, although this was not made clear during his argument. A Xerox copy of the pertinent sections of the Governmental Immunity Act is attached to this letter. This act waives immunity for many actions, such as tort and contract, as well as actions involving property.

Section 63-30-16 provides:

> "The district courts shall have exclusive jurisdiction over any action *brought under this act* and such actions shall be governed by the Utah Rules of Civil Procedure in so far as they are consistent with this act." (emphasis added)

Section 36 of the act provides:

> "All other acts or statutes in conflict with the provisions of this act are repealed as of the effective date of this act."

There is no cross reference to Section 78-11-9 of the Judicial Code.

No Utah court has held that Section 78-11-9 has been repealed by implication. Utah follows the general rule that repeal of a statute by implication is not favored by the courts and only occurs if the later statute is wholly irreconcilable with the former statute. *Moss v. Board of Commissioners of Salt Lake City*, 1 Utah 2d 60, 261 P.2d 961 (1953). Also, whenever possible, an earlier and later statute will

be harmonized so that they can stand separately and both be given effect. *Nelden v. Clark,* 20 Utah 382, 59 P. 524 (1899).

Section 78-11-9 and the Utah Governmental Immunity Act are neither irreconcilable nor inconsistent. Both Section 78-11-9 and Section 63-30-6 of the Imunity Act permit the State of Utah to be sued for recovery of property or to quiet title thereto, but the former statute, unlike the latter, expressly excludes any money judgment against the State in connection therewith. Accordingly, if a litigant desires to recover money as well as property against Utah, he can sue the State under the Governmental Immunity Act, but he is limited "under this act" to the Utah courts. Conversely, where Federal jurisdiction otherwise exists, nothing in the Governmental Immunity Act is inconsistent with a litigant suing the State in the Federal court pursuant to Section 78-11-9 where he seeks only to recover property.

The foregoing is submitted merely to clear up whatever confusion may exist in the record and to reaffirm Morton's position on this point.

Very truly yours,

FRANK A. WOLLAEGER

FAW:mh
Enclosure

cc: Honorable Erwin N. Griswold
Honorable Phil L. Hansen
George E. Boss, Esq.
Robert D. Larsen, Esq.

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No. 31, ORIGINAL

FILED
DEC 11 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCEPTIONS OF MORTON INTERNATIONAL, INC. TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

L. M. McBRIDE
FRANK A. WOLLAEGER
110 North Wacker Drive
Chicago, Illinois 60606

MYER FELDMAN
MARTIN JACOBS
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBRIDE, BAKER, WIENKE & SCHLOSSER
GINSBURG AND FELDMAN
Of Counsel

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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CONSTITUTIONAL PROVISIONS:

United States Constitution, Article III, Section 2 2

STATUTES:

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Enabling Act approved July 16, 1894, 28 Stat. 107 7

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No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCEPTIONS OF MORTON INTERNATIONAL, INC. TO REPORT OF SPECIAL MASTER AND SUPPORTING BRIEF

EXCEPTIONS

MORTON INTERNATIONAL, INC., a Delaware corporation (hereinafter referred to as "Morton"), movant for intervention herein, excepts generally to the conclusions of law, opinion and recommendations contained in the Report of the Special Master filed with the Court on October 28, 1968, other than the Special Master's conclusion contained in Part IV of his Report that the complaint presents a case or controversy within the meaning of the Constitution of the United States, and in support of such exceptions Morton respectfully submits the following brief.

STATEMENT OF THE CASE

This is a civil action in which the State of Utah seeks a judicial determination to quiet title to certain lands and minerals therein situated below the surveyed meander line of the Great Salt Lake and an adjudication that the United States has no right, title or interest in or to those lands and

minerals. The action was instituted pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and the Act of June 3, 1966, 80 Stat. 192 (Public Law 89-441), as amended by Act of August 23, 1966 80 Stat. 349, which Act is set forth beginning at page 52 of the Special Master's Report. This action by the State of Utah was also authorized by an Act of the Utah State Legislature.[1]

On July 14, 1967 the United States filed its answer to the complaint, and on September 18, 1967 Morton filed its motion to intervene as a defendant and its proposed answer on the ground that it is a person who must be joined as a party to the action under the indispensable party doctrine. The proceedings thus far have been set forth in detail in Parts II and III and in the Appendix of the Special Master's Report and will not be restated here, except for such items as have particular significance to the issue of Morton's intervention.

Briefly summarized, the factual basis for Morton's motion to intervene as a person whose joinder is required under the indispensable party doctrine is as follows:

(1) Utah has alleged in its complaint that on January 4, 1896, the date on which the State was admitted to the Union, the Great Salt Lake was a navigable body of water and that therefore it is the owner of the absolute right to the bed of the Lake as delineated and determined by the official surveyed meander line. Utah has also alleged that it owns all of the minerals contained in the waters and bed of the Lake, and that it believes the United States claims to own approximately 436,000 acres of the bed of the Lake. The latter lands are generally identified on a map prepared

[1] Laws of Utah, 1966, 2d Spec. Sess. ch. 11.

by the Bureau of Land Management of the Department of Interior, a copy of which was appended to the complaint as Exhibit A.

(2) In its answer, the United States denied Utah's allegations of ownership of the lands described in Exhibit A, admitted that the United States claims to own those lands, and prayed for an adjudication confirming and establishing that the United States is the owner of all right, title and interest in those lands. The answer further prayed that the Court declare that the sole right of Utah is "to have these lands conveyed to it by the United States, and to pay for them in accordance with the provisions of the Act of June 3, 1966, as amended." (Answer, p. 3)

(3) As shown on Exhibit A to the complaint, a part of the land claimed by the United States consists of exposed lands (hereinafter referred to as "relicted lands") situated between the present water's edge of the Lake and the surveyed meander line in those areas where the United States owns the land (hereinafter referred to as "uplands") situated above and adjacent to the meander line, and a part consists of relicted lands situated around the Lake where the uplands are owned by private persons. The former relicted lands are referred to as "Public Domain Reliction" and the latter are referred to as "PL Reliction under Basart"[2] on Exhibit A.

(4) The relicted lands claimed by Morton, shown in crosshatching on the following plat of survey, include a portion of the lands which, in this action, are being claimed both by Utah and the United States. To the extent that the United States' claims can presently be ascertained, that portion is shown in red on the following plat of survey.

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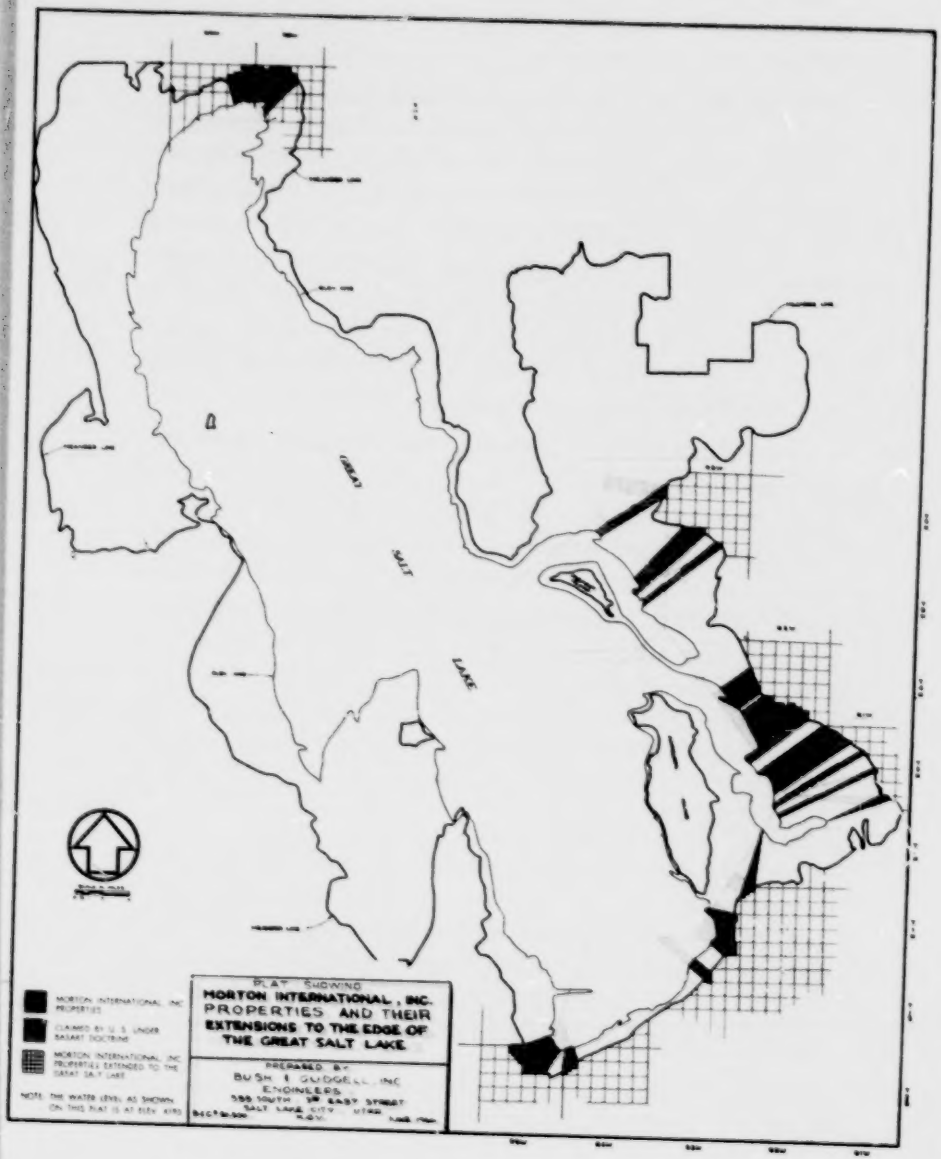
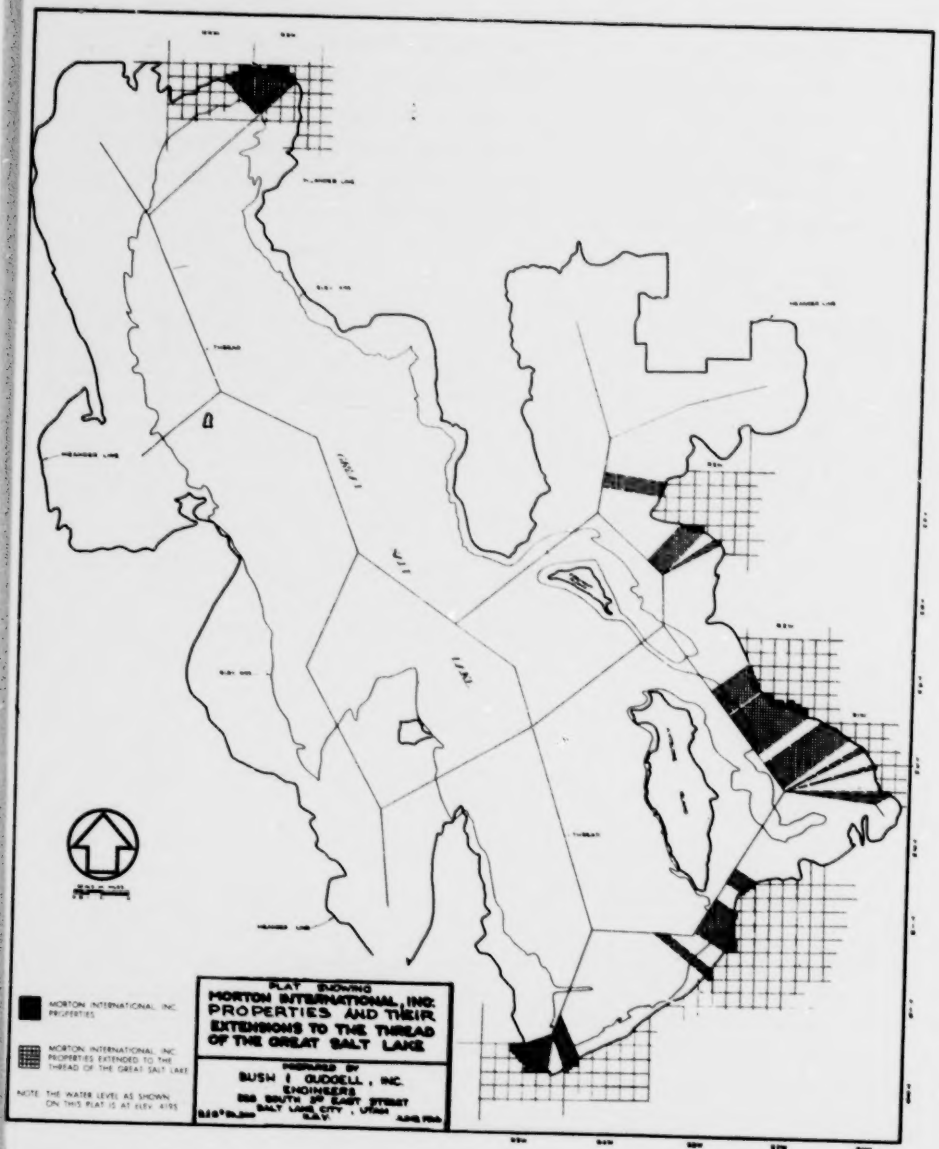
[2] "Basart" presumably refers to the theory of the administrative decision in *Madison* v. *Basart*, 59 I.D. 415 (1947).


GREAT
SALT
LAKE
MORTON INTERNATIONAL, INC. PROPERTIES
CLAIMED BY U. S. UNDER BASART DOCTRINE
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC.
PROPERTIES AND THEIR
EXTENSIONS TO THE EDGE OF
THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDGELL, INC.
ENGINEERS
SALT LAKE CITY, UTAH

(5) It is Morton's further claim that its title with respect to each tract extends to the thread of the Lake (the lands from the water's edge to the thread of the Lake are hereinafter referred to as "water covered lands"), and that therefore Morton also owns part of the brines and minerals in solution in the Lake. The survey projections delineating Morton's ownership to the various threads of the Lake are shown on the following plat of survey.


MORTON INTERNATIONAL, INC. PROPERTIES
MORTON INTERNATIONAL, INC. PROPERTIES EXTENDED TO THE THREAD OF THE GREAT SALT LAKE
NOTE: THE WATER LEVEL AS SHOWN ON THIS PLAT IS AT ELEV. 4195
PLAT SHOWING
MORTON INTERNATIONAL, INC. PROPERTIES AND THEIR EXTENSIONS TO THE THREAD OF THE GREAT SALT LAKE
PREPARED BY
BUSH & GUDDELL, INC.
ENGINEERS
SALT LAKE CITY, UTAH

(6) Utah has granted leases of relicted lands, *including relicted lands claimed by Morton and the United States,* to various private persons and has granted licenses and permits to said lessees for the extraction of minerals in solution in the waters of the Lake.[3]

Morton's claim of title to the relicted lands is based on its ownership of tracts of uplands, title to which it derived from the United States by virtue of mesne conveyances through patents granted by the United States under authority of Acts of Congress and through the Enabling Act approved July 16, 1894, 28 Stat. 107, which tracts are described and the patents and Acts of Congress are set forth in Exhibit I to Morton's proposed answer. These uplands are riparian to the Lake, and it is Morton's position that under Federal decisional law the grants contained in the government patents conveyed to Morton title to the tracts of relicted lands in front of these uplands.

The basis of Morton's claim of title to the water covered lands and brines and minerals in solution is that, on the date of Utah's admission to statehood, the Lake was not navigable and, therefore, these water covered lands and

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[3] To protect its rights, Morton has filed suit against Utah and various of its officials and others in the United States District Court for the District of Utah (Civil No. C-127-66) alleging that Utah has taken and deprived it of property without due process of law in violation of the Fourteenth Amendment to the Constitution. Utah filed an answer and counterclaim alleging, among other things, that "the United States owns or claims to own certain interests in the lands and other properties which plaintiff seeks to obtain by its amended complaint, and is therefore an indispensible [sic] party to this action," and that, since the United States has not been made a party to that action, the complaint should be dismissed. All further proceedings in said case have been stayed pending adjudication of the issues in this action.

brines and minerals are Morton's property under Federal decisional law.

The basis of the United States' claim under the so-called Basart doctrine to title to lands claimed by Morton is the administrative decision in *Madison* v. *Basart,* 59 I.D. 415 (1947), in which the Department of Interior ruled that, where a substantial accretion had formed between the meander line and the shore line of the Missouri River by the time of the grant of a patent to a lot of public land abutting on a meander line, title to the accreted land did not pass under the patent.

Despite Utah's theory of navigability set forth in the complaint, it is apparent, as is recognized in Utah's motion to file the complaint, that there are various other theories upon which Utah depends to support its claim to all or part of the property in dispute, *i.e.*:

> (a) the Lake could be held to be navigable and the "mean high water line" fixed substantially below the meander line resulting in a division of the relicted lands between Utah and the upland owners, or
>
> (b) the Lake could be held to be navigable and only relictions existing before statehood be held to be the property of the upland owners, or
>
> (c) the Lake could be held to be navigable with all relicted lands held to be owned by the upland owners to the water's edge wherever it may be from time to time.

Until the Stipulation was entered into by Utah and the United States on March 29, 1968 (See Appendix to Special Master's Report, pp. 67-72), the United States supported Morton's motion to intervene both in oral argument before the Special Master and in a memorandum filed with the

Court[4] on the ground that Morton's claim as an upland fee owner made it an indispensable party. The United States opposed the motion of Great Salt Lake Minerals & Chemicals Corporation ("M & C Corporation") to intervene as a party plaintiff on the ground that its motion was predicated on its interest as a lessee of Utah, which interest was identical to Utah's and adequately represented by Utah.[5]

In view of the United States' opposition to its intervention as a lessee of Utah, M & C Corporation on or about February 19, 1968 filed a Supplemental Motion to Intervene, in the alternative, as a defendant, predicated on its fee ownership of uplands. On February 21, 1968 the United States filed a memorandum in response to M & C Corporation's amended motion in which the United States stated that it did not oppose the intervention for the reason that, as a fee owner, M & C Corporation was in the same position as Morton, *i.e.*, an indispensable party.

Utah has opposed Morton's intervention (as well as M & C Corporation's) on the ground that Utah and the United States have not consented to be sued by Morton.[6]

Upon entering the Stipulation with Utah the United States has taken the position that Morton (and M & C Corporation) was no longer an indispensable party since the Stipulation had eliminated the need to litigate the issue of the United States' Basart claims, although the United

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[4] Transcript, February 9, 1968, pp. 27-29; Memorandum for the United States, January, 1968, pp. 4-6.

[5] Transcript, February 9, 1968, pp. 24-27.

[6] Contrary to the Special Master's statement, Utah never gave as a reason that it had not consented *to sue* Morton.

States acknowledged that Morton still had a sufficient interest to be joined as a permissive party.[7]

SUMMARY OF ARGUMENT

The recommendations of the Special Master in his Report are primarily based on the doctrine of sovereign immunity, *i.e.*, the lack of consent on the part of Utah *to sue* Morton. Specifically, the Special Master bases each of the following parts of his Report on the purported sovereign immunity of Utah:

> (1) His interpretation of Public Law 89-441 and his recommendation that, subject to the changes indicated, the Stipulation is valid and should be allowed to be filed. (Report, Part V)
>
> (2) His recommendation that Morton's motion to intervene be denied. (Report, Part VI)
>
> (3) His recommendation that Morton is not "indispensable" within the meaning of Rule 19(b) of the Federal Rules of Civil Procedure and that the Court should proceed to adjudicate the controversy in Morton's "compelled" absence. (Report, Part VII)

Since it is apparent from the Special Master's opinion that, were it not for the doctrine of sovereign immunity, Morton's motion to intervene should be granted, we will address ourselves first to this basic issue which has been a fruitful subject of litigation in this Court[8] and a topic

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[7] Transcript, April 26, 1968, pp. 130-131.

[8] *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436 (1834); *Hill* v. *United States*, 50 U.S. (9 How.) 386 (1850); *Langford* v. *United States*, 101 U.S. 341 (1879); *United States* v. *Lee*, 106 U.S. 196 (1882); *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Kawananakoa* v. *Polyblank*, 205 U.S. 349 (1907); *United States* v. *Shaw*, 309 U.S. 495 (1940); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).

for discussion by legal writers dating back to Bracton.[9] The doctrine, although frequently critized, is still applied in appropriate cases in this country, but the Special Master's application of it to this case is an unprecedented and unwarranted extension which the Court should not adopt. The foregoing will be shown by development of two points. First, under the common law sovereign immunity is not a bar to the intervention of Morton in this action. Second, by any reasonable construction Utah and the United States each has consented by statute to the intervention of interested persons, such as Morton, in this case.

If sovereign immunity is not applicable, the Special Master's reasoning, which supports his conclusions and recommendations set forth above, must fail and Morton's motion to intervene should be granted.

ARGUMENT

I. UNDER COMMON LAW SOVEREIGN IMMUNITY IS NO BAR TO MORTON'S INTERVENTION IN THIS CASE.

The question is whether a person whose joinder is required within the meaning of the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure shall be denied the right to intervene for lack of express statutory consent by one or more sovereigns who are parties to the action. We submit that the law is, and always has been, that he shall not be denied such right.

However, despite the vast number of cases involving sovereign immunity, there are very few decisions which mention this precise question although most courts, includ-

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[9] Bracton, DE LEGIBUS ET CONSUETUDINES ANGLIAE (London, Twiss' ed. 1878).

ing this Court, have properly permitted the intervention.[10] The United States in this case has not asserted sovereign immunity as a bar to Morton's intervention for the reason stated by the Solicitor General during the course of his argument before the Special Master on February 9, 1968:

> "[Mr. Griswold] . . . Now, there is also the basis for which there is great support that, when a sovereign starts a suit to quiet title, it thereby consents to adverse claims."[11]

To explain the basis for permitting intervention in such cases it is necessary to examine the history of the doctrine of sovereign immunity and the status of the common law on the subject at the time of the adoption of the Constitution. The Court was confronted with the problem shortly after the Revolution in the famous case of *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793). This was an original action *in assumpsit* against the State of Georgia by a private citizen of the State of South Carolina. The Court held that such a suit could be maintained with four Justices rendering separate opinions in support thereof. Justices Jay, Blair and Cushing ruled that the constitutional grant of jurisdiction over controversies between a "state and a citizen of another state" permitted such a suit. Justice Wilson completely rejected the doctrine of sovereign immunity stating (2 U.S. at 454):

> "[T]o the Constitution of the United States the term sovereign, is totally unknown."

And continuing (2 U.S. at 457):

> "In this sense, sovereignty is derived from a feudal source; and like many other parts of that system, so

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[10] *Oklahoma* v. *Texas*, 258 U.S. 574 (1922); *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936); *California* v. *United States*, 180 F.2d 596 (9th Cir. 1950).

[11] Transcript, February 9, 1968, p. 34.

> degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American states."

Both Chief Justice Jay and Justice Cushing raised the question of the right of a citizen to sue the United States, but neither attempted to provide an answer although the Chief Justice indicated his feelings on the subject stating (2 U.S. at 478):

> "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question."

Justice Iredell wrote the only dissenting opinion with a scholarly examination of the development of the doctrine in England upon which he based his conclusion that sovereign immunity was part of the common law of the several states at the time of this country's independence. Justice Iredell's dissenting opinion, which since the adoption of the Eleventh Amendment has been held to represent *the law*,[12] concludes that the sovereign power with respect to granting or withholding consent to suit resides in the legislature, which consent had not been given by the Legislature of Georgia.

As the leading authority on the status of the common law relating to sovereign immunity, Justice Iredell's opin-

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[12] *United States* v. *Clarke*, *supra*, n. 8; *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883); *Hans* v. *Louisiana*, *supra*, n. 8; *Smith* v. *Reeves*, 178 U.S. 436 (1900); *Williams* v. *United States*, 289 U.S. 553 (1933).

ion has a direct bearing on the issue at hand. He states (2 U.S. at 434-435):

> "The principles of law to which reference is to be had, either upon the general ground I first alluded to, or upon the special words I have above cited, from the judicial act, I apprehend, can be, either, 1st. Those of the particular laws of the states against which the suit is brought. Or, 2d. Principles of law common to all the states . . . .
>
> "But this point [the particular laws of the state against which the suit is brought], I conceive, it is unnecessary to determine, because I believe there is no doubt that neither in the state now in question, nor in any other in the union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a state, was in being either when the constitution was adopted, or at the time the judicial act was passed. Since that time an act of assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the legislature of the United States passed before.
>
> "The only principles of law, then, that can be regarded, are those common to all the states. I know of none such, which can affect this case, but those that are derived from what is properly termed 'the common law' a law which I presume is the ground-work of the laws in every state of the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each state, as it existed in England, (unaltered by any statute) at the time of the first settlement of the country. The statutes of England that are in force in America differ perhaps in all the states; and, therefore, it is probable the common law in each, is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statue, which could occasion the least material difference, or have any partial

effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown."

Justice Iredell then proceeds to consider the English law on remedies against the King stating (2 U.S. at 439-440):

"The observations of Lord Somers [in *The Bankers Case*, 14 How. State Trials 1 (1700)], concerning the general remedy by petition to the King, have been extracted and referred to by some of the ablest law characters since; particularly by Lord C. Baron Comyns in his digest. I shall, therefore, extract some of them, as he appears to have taken uncommon pains to collect all the material learning on the subject; and indeed is said to have expended several hundred pounds in the procuring of records relative to that case . . . .

"After citing many authorities, Lord Somers proceeds thus:—'By all these authorities, and by many others, which I could cite, both ancient and modern, it is plain, that if the subject was to recover a rent, or annuity, or other charge from the crown, whether it was a rent or annuity, originally granted by the King; or issuing out of lands, which by subsequent title came to be in the King's hands; in all cases the remedy to come at it was by petition to the person of the King; and no other method can be shown to have been practiced at common law. Indeed, I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff, to recover anything from the King, his only remedy, at common law, is to sue by petition to the person of the King. *I say, where the subject comes as a plaintiff. For, as I said before, when, upon a title found for the King by office, the subject comes in to traverse the King's title, or to show his own right, he comes in the nature of a defendant; and is admitted to interplead in the case with the King in defense of his title, which otherwise would be defeated by finding the office.*'" (Emphasis added)

Thus, Judge Iredell states, on the authority of Lord Somers, at common law in England a person seeking to bring an action against the sovereign was limited to a Petition of Right since an ordinary writ did not lie against the King.[13] The nature of this remedy, developed during the reign of Edward I, is described by Professor Borchard:[14]

> "In the fourteenth Century there was as yet no notion that the king was not responsible for wrongs done his subjects or that he was infallible. On the contrary, the possibility of his doing wrong was freely admitted and an elaborate procedure devised by which the injured subject could invoke relief. The fact that this method of relief was often cumbersome, that it required the king's permission and was surrounded by various safeguards against undue royal burden, does not detract, it is believed, from its essentially legal nature. While it is true that the petition might be refused, thus giving it the color of a supplication for grace, the fact seems to be that petitions were not rejected or dismissed except for strictly legal reasons. Custom had enjoined upon the king the rule of law that a petition founded upon the violation of what practice had developed and characterized as a legal or vested right, should not go unredressed."

However, since the Petition of Right entailed a cumbersome and complicated procedure, another procedure was developed, not requiring consent, in certain cases involving the Crown's interests in real property. This remedy was known as traversing the King's title, which procedure developed by custom and later by statute.[15] A frequent method by which the King obtained title to the property

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[13] Holdsworth, *The History of Remedies Against the Crown*, 38 Law Quarterly Review 141, 143 (1922); Borchard, *Governmental Responsibility in Tort*, 36 Yale L. J. 1, 18 (1926).

[14] Borchard, *supra*, p. 27.

[15] 34 Edw. III, c. 14 (1360); 36 Edw. III, c. 13 (1362).

of his subjects was by holding an inquest upon the death of his tenant, on the lunacy of a subject or on the attainder of a subject for treason or felony, to determine what property that subject held. When the royal officer conducting the inquest found that the subject in question possessed certain property, the King seized it and was said to be entitled by office found. It then developed that a person claiming title to property, which was the subject of an inquest, could enter the proceeding to traverse the facts found by the office in order to show that the King was not entitled to the property or to show his own superior right *(monstrans de droit). The Sadlers' Case*, 4 Co. Rep. 54b, 76 Eng. Rep. 1012 (1588); Holdsworth, *The History of Remedies Against the Crown*, 38 Law Quarterly Review 141, 158 (1922); Borchard, *Governmental Responsibility in Tort*, 36 Yale L.J. 1, 29 (1926).

It would be stating too much to say that the remedies of traverse and *monstrans de droit*, as such, existed in the colonies prior to the Revolution. Their significance, however, lies in the fact that Justice Iredell, on the authority of Lord Somers, considers them to be exceptions to the common law requirement of sovereign consent where a person seeks to enter a proceeding, instituted by the sovereign, as a *defendant* to defend his title rather than suing the sovereign as plaintiff. The terms "plaintiff" and "defendant" are obviously used to merely identify which party has brought the action, and the term "interplead in the case" is used by Lord Somers to describe what we now refer to as intervention.

We submit that the right of a person to intervene to defend his title to property in an action brought by a sovereign is a part of the common law of the states and a part of the decisional law of the United States. The Eleventh Amendment was hurriedly adopted after *Chisholm* v. *Georgia*

to prevent the states from being sued on their obligations in Federal courts, but did not change the common law on the subject of sovereign immunity. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). It was early decided by the Court that a defendant had a right of recoupment to offset a claim in an action brought against him by the United States. *United States* v. *MacDaniel*, 32 U.S. (7 Pet.) 1 (1833); *United States* v. *Ringgold*, 33 U.S. (8 Pet.) 150 (1834). Subsequently, this Court held in *The Siren*, 74 U.S. (7 Wall.) 152 (1869), that sovereign immunity was no bar to the assertion of a maritime lien against a vessel, which had been seized by the United States as a prize of war, in an action instituted by the United States in the prize court, stating (74 U.S. at 154):

> "But although direct suits cannot be maintained against the United States, nor against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy."[16]

Although this Court has held many times that there are no exceptions to the doctrine that a sovereign is immune

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[16] The fact that this case was *in rem* clearly had no bearing on the question of sovereign immunity, contrary to the Special Master's thesis that actions *in rem* are an exception to the rule. (Report, p. 33)

from *direct* suit without its consent,[17] the rule in these

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[17] *United States* v. *Clarke, supra,* n. 8; *The Siren,* 74 U.S. (7 Wall.) 152 (1869); *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47 (1944).

The following cases cited by the Special Master in his Report at page 33 to show that there are certain types of actions where the consent of a sovereign is not a prerequisite to intervention do not support this thesis.

Krippendorf v. *Hyde,* 110 U.S. 276 (1884). An action by creditors to attach debtor's property in the hands of a third party. This third party, whose presence would destroy the Federal court's diversity jurisdiction, attempted to intervene in the action to protect his interest in the attached property. The Court indicated that, in order to prevent the abuse of process (the third party had no adequate legal remedy in the state courts), his intervention would be allowed as his claim would be merely ancillary to the original suit. No sovereign was a party to this action, so consequently the question of immunity from suit or consent was not raised.

Stewart v. *Dunham,* 115 U.S. 61 (1885). An action by creditors to set aside a conveyance of merchandise by their debtor. The action was removed from a state court and Federal jurisdiction based on diversity. After removal additional creditors were allowed to enter the action, and their citizenship would have destroyed diversity if they had joined before removal. The Court held that the lower Federal court had acquired jurisdiction lawfully at the time of removal, so the introduction later of additional creditors did not oust the Court of jurisdiction as this joinder was ancillary to the jurisdiction acquired over the original parties. Neither the United States nor any state was a party to this action, and the question of sovereign immunity or consent was never raised.

Texas v. *Florida,* 306 U.S. 398 (1939). An original action in the nature of a bill of interpleader by the State of Texas against the States of Florida, New York, and Massachusetts and against several individuals to determine the true domicile of a decedent due to rival claims by those four states for death taxes. There was no attempt by any person to intervene in this action, and no mention was made by the Court of either sovereign immunity or consent to be sued.

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decisions has not been applied to the intervention of an interested party in a case such as this. *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), was a suit in equity brought in this Court by the State of Oklahoma against the State of Texas to settle a dispute over their common boundary along the Red River and over title to the river bed. The United States intervened claiming title to the river bed as against both states. The disputed area contained valuable oil and

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New Jersey v. *New York*, 345 U.S. 369 (1953). An original action by the State of New Jersey against the State of New York and New York City for injunctive relief against diversion of waters of the Delaware River. The Commonwealth of Pennsylvania petitioned for leave to intervene *pro interesse suo*, and it was granted. This action was initiated in 1929 and a decree was rendered in 1931 enjoining the defendants from diverting more than a prescribed amount of water from the river. This decree also stated that any of the parties to this action could apply for further relief at any time with regard to the subject matter in controversy. In 1952 the City of New York applied for such additional relief. New Jersey and Pennsylvania filed answers opposing such relief, and the matter was referred to a Special Master. In December of 1952 the City of Philadelphia filed a motion for leave to intervene. This Court stated that it was unnecessary to decide whether Philadelphia's intervention was in violation of the Eleventh Amendment. It was indicated that, if Philadelphia were allowed to intervene, there would be other cities along the Delaware River that would also insist upon a right to intervene. The Supreme Court stressed that its original jurisdiction should not be expanded to the dimensions of an ordinary class action, when the interest of a member of that class who desires to intervene is already properly represented by his state which is a party to the action. In order to allow such an intervention the intervenor must show some compelling interest in his own right, apart from his interest in a class with all other citizens of the state. Philadelphia could not show such an interest, and, consequently, its motion for leave to intervene was denied. The Court does not discuss sovereign immunity or consent *vis-a-vis* intervention.

Oklahoma v. *Texas*, *supra*, n. 10. This case is discussed above.

gas bearing strata and the situation evidently became chaotic. In the Court's words "it developed . . . that possession of parts of the bed was being taken and held by intimidation and force; that in suits for injunction the courts of both states were assuming jurisdiction over the same areas; that armed conflicts between rival aspirants for the oil and gas had been but narrowly adverted and still were imminent; that the militia of Texas had been called to support the orders of its courts, and an effort was being made to have the militia of Oklahoma called for a like purpose. . . ." (258 U.S. at 579-580)

In these circumstances to preserve public tranquility and prevent waste the United States, Oklahoma and Texas agreed to the appointment of a receiver by the Court to administer the area pending adjudication of title. Thereafter, numerous private parties claiming title to portions of the disputed property were permitted by this Court to intervene, many of which claims "conflict one with another *and all are in conflict with the claims of one or more of the three principal litigants.*" (258 U.S. at 581; emphasis added) These claimants were obviously indispensable parties, and there was no statutory consent on the part of any of the sovereigns to their intervention. Their right to intervene without consent was assumed by the Court. Contrary to the Special Master's assertion on page 33 of his Report, this was not an action *in rem* but a suit to quiet title just as this suit is. A quiet title action is characterized as being *quasi in rem*,[18] but, in any event, the type of action, whether *in personam*, *in rem* or *quasi in rem*, clearly has no bearing on the issue of sovereign immunity. *The Siren, supra.*

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[18] *Prudential Ins. Co. of America* v. *Zimmerer*, 66 F. Supp. 492 (D.C. Neb 1946); *Humble Oil and Refining Co.* v. *Sun Oil Co.*, 191 F.2d 705 (5th Cir 1951); 74 C.J.S. *Quieting Title* § 7 (1951).

At least one court has stated the rationale for permitting the intervention of interested parties without statutory consent. *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950), involved an action by the United States to quiet title to waters wholly within California against a lessee of the State of California which was diverting a portion of the water for irrigation purposes. California moved to intervene as owner of the water, the denial of which motion was reversed by the court of appeals stating (180 F.2d at 602):

> "The Government also makes the contention that this is a suit against the Government and, there being no statute authorizing it, the Court does not have jurisdiction. The short answer to that is that the Government chose the forum in which it is seeking to quiet title to the water. The State is asserting an interest in the subject matter as absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. This is a sufficient interest in the subject matter to entitle it to be heard, just as if the State were joined by the United States originally as a defendant."

In the widely-quoted case, *Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936), the court, reversing the decree in a quiet title action, directed the trial court to permit the intervention of the States of Washingon and Oregon on the ground that the order denying intervention deprived these states of any effective remedy for the adjudication of title because the United States had not consented to a subsequent suit against it. Clearly, these courts, without discussing the issue further, are applying the exception to the requirement of sovereign consent under the common law as Lord Somers and Justice Iredell stated it to be, *i.e.*, the right to come in "in the nature of a defendant . . . in defense of his title."

Utah has adopted the common law of England,[19] and there is no Utah decision which supports the Special Master's conclusions with respect to sovereign immunity in this case. Indeed, the Utah Supreme Court has recently stated in *Nestman* v. *South Davis County Water Improvement Dist.*, 16 Utah 2d 198, 201, 398 P. 2d 203, 204 (1965):

> "We have no disposition nor desire to extend it [sovereign immunity] any further than its already established application."

The doctrine is not a popular one, to say the least, and it has been found obnoxious to the principles of justice by many authorities.[20] This Court has more recently recognized that the doctrine is in disfavor[21] and that there exists a trend toward relaxing its rigors wherever possible.[22] If this Court adopts the Special Master's conclusions, it would be a step in the opposite direction for no justifiable purpose.

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[19] Utah Code Annotated, Section 68-3-1. "The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."

[20] *Chisholm* v. *Georgia, supra,* n. 8; *United States* v. *Lee, supra,* n. 8; Laski, *The Responsibility of the State in England,* 32 Harv. L.R. 447 (1919); Borchard, *supra,* n. 13 at 798-807; *Kennecott Copper Corporation* v. *State Tax Commission,* 327 U.S. 573, 580 (1946) (Justice Frankfurter, dissenting); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 La. L.R. 476, 492-494 (1953).

[21] *Davis* v. *Pringle,* 268 U.S. 315 (1925); *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U.S. 381 (1939); *Federal Housing Administration* v. *Burr,* 309 U.S. 242 (1940); *National City Bank of New York* v. *Republic of China,* 348 U.S. 356 (1955).

[22] *United States v. Shaw, supra,* n. 8.

II. UTAH AND THE UNITED STATES HAVE CONSENTED BY STATUTE TO MORTON'S INTERVENTION.

Assuming, *arguendo,* that statutory consent is required for Morton's intervention, Utah has consented by virtue of Section 78-11-9, Utah Code Annotated. This statute provides:

> "*State of Utah party defendant in certain suits*—Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought *in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto,* or to foreclose mortgages or other liens thereon *or to determine any adverse claim thereon,* or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. It shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof." (Emphasis added)

Utah argued that Section 78-11-9 has been repealed by implication by the Utah Governmental Immunity Act, Sections 63-30-1, *et seq.,* Utah Code Annotated, effective July 1, 1966. The Special Master, while conceding the correctness of Morton's argument that Section 78-11-9 has not been repealed, states that it is not applicable on the basis that "In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such." (Report,

p. 37) The Special Master thus adheres to the formalistic approach, which he uses in labeling actions *in personam* or *in rem*, in determining a party's rights by whether he is designated *plaintiff* or *defendant*. He then reasons that, since the title of the statute uses the term *defendant* when referring to Utah, it necessarily excludes prosecuting of adverse claims against Utah in any action in which Utah appears as plaintiff. This reasoning completely ignores the text of the statute which has no such limitation and speaks in terms of Utah being named "a party" in any pending or subsequent action for the recovery of property or "to determine any adverse claim thereon."

Such reliance on form over substance in the designation of a party has been rejected by this Court. *Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902); *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945). In *Ford Motor Company*, this Court stated (323 U.S. at 464):

> "We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."

Utah supports this view stating (Brief in Opposition to Morton's Motion, p. 4):

> "It makes no difference that Morton in *form* seeks simply to intervene as a defendant and to merely 'answer' the complaint of the State of Utah when in truth and fact the real substance of the answer proposed by Morton is a denial of the title claimed by the State of Utah and a claim by Morton of ownership in itself to the same lands. The nature of Morton as a party must be determined by the essential nature and effect of the position Morton occupies in the proceeding, rather than by the formal designation of Morton as a defendant."

The United States has taken a similar position.[23]

Actually, there is no support in any authority which we have been able to locate for the Special Master's opinion that Morton's intervention is barred because Utah has not consented *to sue* Morton. This reasoning would, of course, negate the requirements of joinder as determined by this Court under the indispensable party doctrine and Rule 19(a) of the Federal Rules of Civil Procedure in actions brought by sovereigns. In such a case, if the sovereign does not see fit to join an interested person whose joinder would ordinarily be required, the only course left for the Court is to decide whether to proceed without him on the ground that the sovereign's interests are paramount, as the Special Master urges here, or to dismiss the action. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968). On what basis, either historically or in the interest of justice, can the doctrine of sovereign immunity be stretched to achieve the foregoing result? To state the question is to answer it—there is none.

The Special Master agrees, at page 34 of the Report, with the positions taken by Morton and the United States[24]

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[23] (Solicitor General Griswold) "As far as I see it, it is irrelevant and immaterial whether they [Great Salt Lake Minerals & Chemicals Corporation] seek to intervene as a plaintiff or a defendant. They can be aligned as it fits the situation and the alignment can be changed if the circumstances change, and I don't see that affects the jurisdiction at all." (Transcript, February 9, 1968, pp. 81-2)

[24] "Section 5 of the Act provides that the State of Utah 'may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States' in the lands below the meander line of the Lake. The purpose of this determination is to fix the liability, if any, of the State toward the United States for these lands which are to be relinquished to the State. Yet, if there are other claimants,

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that under the provisions of Public Law 89-441 the United States has consented to the joinder of other defendants since Section 5(b) of the Act provides that:

> "Consent is given to join the United States as *a* defendant in this action." (Emphasis added)

He does, however, qualify this by stating that, if Morton's motion is interpreted as also seeking leave to file a cross-claim against the United States, it should be denied for it would be suing the United States without "Constitutional authority." The basis for this is that the prayer for relief in Morton's answer states that the United States is without any right or title to the relicted lands and bed of the Lake claimed by Morton. Obviously, however, Morton is defending its title against the Basart claims of the United States, which it clearly has the right to do. It would, indeed, be difficult for a person to defend his title unless he could challenge the title of the person claiming against him.

III. MORTON'S JOINDER AS A PARTY IS REQUIRED UNDER RULE 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Under the respective claims and prayers for relief in the complaint and answer each party is seeking an adjudication quieting title in it to the lands, brines and minerals

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besides Utah, it is obvious that the title of the United States cannot be determined without adjudicating those claims as well. Nor is the United States entitled to payment for the lands if the true owners are the private claimants. Thus, it seems plain that the object of the suit will be frustrated unless all claims adverse to the United States are now adjudicated. In these circumstances, we submit the jurisdictional act must be construed as permitting, by necessary implication, the assertion and disposition of all claims of ownership with respect to the lands disputed between the State and the United States." (Reply Memorandum for the United States, pp. 4-5)

described in Section 2 of Public Law 89-441.[25] Assuming, for the moment, that the Stipulation between the United States and Utah is valid and will be carried out by the parties, the fact remains that the United States and Utah each claims lands, brines and minerals which are also claimed by Morton, and in order to determine the right, title and interest of the United States in the lands conveyed pursuant to the Act, the Court will have to determine whether Morton or the United States owns the lands, brines and minerals in dispute between them. Only after this is accomplished will the Secretary of Interior be able to comply with Section 5(b) of the Act to determine the fair market value of the lands and minerals conveyed.

The Stipulation does not alter either party's claims to the subject matter in dispute and, apart from its invalidity as shown in Point IV, the Stipulation is merely an agreement between counsel for the parties, not binding on Morton, as to how they will proceed during the course of the litigation. This agreement could be rescinded at any time by mutual consent of the parties.

Since title to property claimed by Morton will be adjudicated by the Court as between Utah and the United States, Morton is a person who "shall" be joined as a party, if feasible, under Rule 19(a)[26] and whose intervention is

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[25] ". . . all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State, as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake . . . ."

[26] "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined

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required under Rule 24(a).[27] This Court developed the indispensable party doctrine in a long line of decisions which established the criteria for determining when an absent person must be joined if an action is to proceed.[28] The rule was set forth in the leading case of *Shields* v. *Barrow*, 58 U.S. (17 How.) 130 (1855), as follows (58 U.S. at 139):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that

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as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

[27] "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[28] *Barney* v. *Baltimore*, 73 U.S. (6 Wall.) 280 (1868); *Williams* v. *Bankhead*, 86 U.S. (19 Wall.) 563 (1874); *Kendig* v. *Dean*, 97 U.S. 423 (1878); *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199 (1902); *Washington* v. *United States, supra*, n. 10; *McShan* v. *Sherrill*, 283 F.2d 462 (9th Cir. 1960); *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961).

> interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

We do not understand the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson, supra,* to change this rule, but, on the contrary, it clearly adheres to it. The Court did reverse the court of appeals for not using a pragmatic approach in determining whether an absent person must be joined as a party. It adopted the standards set forth in Rule 19(a) relating to the interest of the outsider, *i.e.* (88 S. Ct. at 738):

> "[T]he Court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter."

Applying this criterion to Dutcher, the outsider, the Court stated (88 S. Ct. at 737):

> "We may assume, at the outset, that Dutcher falls within the category or [sic] persons who, under §(a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him."

Applying Rule 19(a) to Morton:

(1) In Morton's absence complete relief cannot be accorded among those already parties. Obviously, the validity of the Basart claims cannot be adjudicated in Morton's absence, otherwise the United States and Utah would not

have resorted to the device of the Stipulation in an attempt to avoid this issue.

(2) Morton claims a *direct* interest in the subject matter of the action as follows:

(a) The Basart lands.

(b) The submerged lands, *all of which* are claimed by both Utah and the United States.

(c) Brines and minerals in solution, *all of which* are claimed by both Utah and the United States. We are aware of no case in which title to the brines or minerals in solution in a non-navigable body of water has been allocated among the riparian owners, and this complex problem is one which the Court may well have to resolve. In any event, no such decision should be made without the participation of all claimants thereto. *California* v. *United States, supra.*

(d) Revenues collected by Utah from leases and mineral extraction licenses granted by Utah with respect to property claimed by Morton, the disposition of which proceeds will be determined by this litigation pursuant to Section 6 of Public Law 89-441 which provides:

> "If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title and interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest."

(3) The disposition of the action in Morton's absence will, as a practical matter, impair or impede Morton's ability to protect that interest. An adjudication of title in Morton's absence, although not technically binding on Morton, will affect Morton's interest by placing a cloud on

its title which it, in all probability, could not remove. *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895); *Washington* v. *United States*, 87 F.2d 421 (9th Cir. 1936). Referring again to the *Provident* case, Dutcher had not sought to intervene prior to trial and it was not until the matter had gone to judgment and appeal, after years of litigation, that the court of appeals dismissed for lack of an indispensable party. In this case, which is in its initial stages, it is apparent that property, whether land, brine, minerals or money, claimed by Morton will be disposed of as a result of the Court's decree, regardless of whether or not the Stipulation can be carried out. Accordingly the disclaimer in Section 6 of the Stipulation as to the effect of a judgment on the title of third parties claiming lands, brines or minerals is meaningless. Pursuant to Section 3 of Public Law 89-441, the United States has expressly reserved all mineral rights, except as to brines and minerals in solution, in the lands conveyed to Utah under Section 2 and this includes the Basart lands. In any suit brought by Morton against Utah, assuming consent on the part of Utah, to test the title to the Basart lands, the United States, due to this reservation, would be required to be joined and it could not be joined without its consent. Thus, any attempt by Morton to litigate its title would undoubtedly be fruitless.

In view of the foregoing, the Special Master's statement, at page 45 of his Report, that Morton's "sole interest in the subject matter of this action is a common question of law and fact" is plainly incorrect. The Special Master does recognize, however, that Morton, unless permitted to intervene in this action, "has no forum . . . to litigate those questions of law and fact," but he qualifies this by the clause "*absent the interference of either sovereign with Morton's quiet enjoyment of the relicted land fronting its uplands.*"

(Emphasis added) We do not understand what the Special Master means by this qualifying statement, unless it is intended to buttress his subsequent statement that "In any event, Morton is in no wise worse off now than before this action was instituted." Of course such is not the case, and furthermore Morton's "quiet enjoyment of the relicted land" is being interfered with since Utah has taken and leased these lands to other private parties, which leases are sanctioned by the United States pursuant to Section 6 of Public Law 89-441.

Since Morton's joinder will not deprive the Court of jurisdiction of the subject matter of the action, contrary to the Special Master's opinion, because the doctrine of sovereign immunity does not apply, its joinder is required under Rule 19(a) and it has a right to intervene pursuant to Rule 24(a). If, however, the Court should find that Morton's joinder is not feasible, we submit that it would not be equitable and in good conscience to proceed with the litigation merely because the parties are sovereigns and Morton is a private person, as urged by the Special Master. In such event, the action should be dismissed or, in the alternative, Utah be granted leave to amend its complaint naming Morton and other interested private persons defendants as well as the United States.

IV. MORTON'S INTERVENTION IS REQUIRED UNDER PUBLIC LAW 89-441 AND THE STIPULATION IS INVALID.

The Special Master's interpretation of Public Law 89-441 in Part V of his Report is premised primarily on the sovereign immunity of Utah. From this premise thereafter everything falls in sequence like a line of dominoes, *i.e.*, the Stipulation is valid under the Act, by reason of the

Stipulation Morton's rights are no longer being affected and therefore Morton is not an indispensable party. Essentially, it is the Special Master's view that it must be assumed that Congress was aware that interested private persons could not be joined without the consent of Utah and so the Act must be construed to permit only an adjudication of part of the property in dispute. The statutory language, however, is plain and unambiguous and there is no need for such tortuous construction since, as we have pointed out, the doctrine of sovereign immunity is not applicable. Even if the doctrine were applicable, no such construction would be necessary since Utah is perfectly free to sue Morton and any other interested persons in addition to the United States.

Section 2 of the Act in pertinent part provides:

> "Subject to the other provisions of this Act, the Secretary of the Interior shall by quitclaim deed convey to the State of Utah *all right, title, and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake in such State,* as duly surveyed heretofore or in accordance with section 1 of this Act, whether such lands now are or in the future may become uncovered by the recession of the waters of said lake: *Provided, however,* That the provisions of this Act shall not affect (1) any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below said meander line, ..." (Emphasis added)

The United States having quitclaimed all its right, title and interest in the lands, brines and minerals, Utah is given an option under Section 5 to elect whether to pay the fair market value thereof as determined by the Secre-

tary, pursuant to subsection 5(a), or pursuant to subsection 5(b):

> "[The State] may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act. Consent to join the United States as a defendant to such an action is hereby given. Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value, as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act *as may be found by the court* to have been the property of the United States prior to the conveyance. If payment by the State of Utah of the fair market value is not made within two years after the receipt of the Secretary's value determination, the conveyance authorized by section 2 of this Act shall be null and void." (Emphasis added)

Thus, the Act requires a judicial determination of all that the United States claims to own in lands, brines and minerals lying below the meander line of the Lake which have been conveyed to Utah, including the Basart claims. If, in fact, it is held that the United States had no title to the Basart lands but that these lands are owned by others such as Morton, these lands are not covered by the conveyance and Utah need not pay for them. Since Congress did not consent to an adjudication of only a portion of the United States' title claims, this Court cannot exercise jurisdiction over the limited action contemplated by the Stipulation.[29] *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436 (1834).

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[29] This was the position taken by the United States prior to the Stipulation at the hearing before the Special Master on February 9, 1968:

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The proviso in Section 2 of the Act is stressed by the Special Master as indicating an intention on the part of Congress to exclude private persons from the litigation, but actually the converse is true. The Special Master is in error when he states that the proviso provides "that a decision of this Court or any other action taken pursuant to the Act shall have no direct bearing on the valid existing rights of third persons." (Report, p. 21) Actually, the proviso merely states explicitly what Congress could not do in any event. Congress cannot merely by legislative action impair a person's property rights since this would be a deprivation of property "without due process of law" prohibited by the Fifth Amendment. *Union Pacific Railroad Co.* v. *United States,* 99 U.S. 700 (1879); *Choate* v. *Trapp,* 224 U.S. 665 (1911). Furthermore, if the Act could be construed as denying a person the right to protect the validity of his title or his property interest through intervention, it would undoubtedly be unconstitutional. This litigation was authorized under the Act "to secure judicial determination of the right, title and interest of the United States" in the property in dispute. Since part of the property in dispute is claimed by private persons, which

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MR GRISWOLD: "As I have thought about this problem over the last two weeks, there have been times when it seems to me that a solution might be if Utah would be willing to amend its bill so as to make it applicable only as to such areas of land, and it might have to specify them by metes and bounds, which might be an enormous task, only as to such land as to which there was no other claim, thus narrowing the case to the areas which are vast, where the sole issue is between the United States and the State of Utah. And that would eliminate all questions of other, or indispensable, parties.

"But I am afraid that that just wouldn't comply with the Statute as Congress has enacted it." (Transcript, February 9, 1968, p. 29)

claims both Utah and the United States assert are invalid, such persons must of necessity be permitted to intervene or their interests and rights *will* be affected contrary to the proviso of Section 2.

The Stipulation is also invalid in that the agreements to convey and the conveyances provided for are beyond the power of the Solicitor General. The Solicitor General, pursuant to the Stipulation, has agreed:

> "5. Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as 'public domain reliction lands,' the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership, prior to June 15, 1967, of the uncovered lands indicated on the attached map as 'public land reliction under *Basart*,' and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441."

In other words, the Solicitor General is agreeing, purportedly on behalf of the United States, that the United States will convey the Basart lands to Utah without compensation if Utah should sucessfully show that it has title to "public domain reliction lands." There is nothing in the Act, however, which can possibly be construed to delegate to the Solicitor General (or to anyone else in the Executive Branch of the Government) the authority to make such an agreement, nor to relinquish Federal rights in lands without compensation unless and until such lands have been determined by the Court, pursuant to the Act, not to have been owned by the United States.

As we have previously pointed out, this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability. If, for example, the

Lake is held to be navigable and the "mean high water line" is fixed by the Court substantially below the meander line, it will result in a division of the relicted lands, both public domain reliction and Basart, between Utah and the upland owners. In such case, the Basart lands coveyed by the United States to Utah for nothing pursuant to the Stipulation would have significant value.

Accordingly, the agreement to relinquish Federal rights is invalid and the conveyance of such lands would be void. As stated by this Court in *Sioux Tribe of Indians* v. *United States,* 316 U.S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority."

CONCLUSION

For the reasons set forth in support of its exceptions to the Special Master's Report, Morton submits that its motion to intervene should be granted.

Respectfully submitted,

L. M. McBride
Frank A. Wollaeger
110 North Wacker Drive
Chicago, Illinois 60606

Myer Feldman
Martin Jacobs
1700 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Counsel for Morton International, Inc.

McBride, Baker, Wienke & Schlosser
Ginsburg and Feldman

Of Counsel

December, 1968.

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Exceptions to Report of Special Master and Supporting Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114; and Raymond T. Senior, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by having the same delivered to their respective offices, in accordance with Rule 33 of the Rules of this Court.

FRANK A. WOLLAEGER
Counsel for Morton International, Inc.

No. 31, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, PLAINTIFF

v.

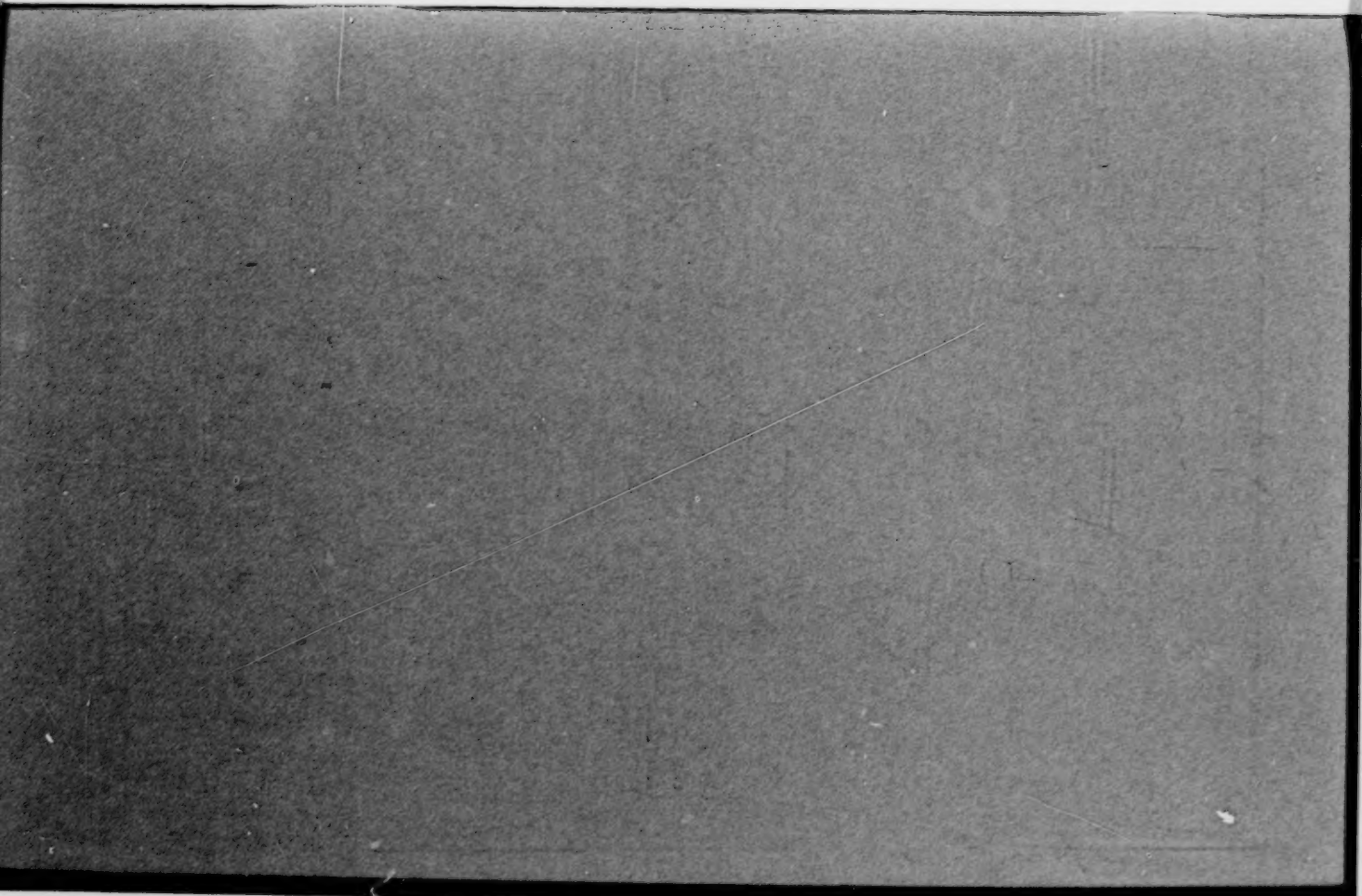
UNITED STATES OF AMERICA, DEFENDANT

ON BILL OF COMPLAINT

MOTION OF GREAT SALT LAKE MINERALS & CHEMICALS CORPORATION FOR LEAVE TO FILE MEMORANDUM IN LIEU OF EXCEPTIONS TO REPORT OF SPECIAL MASTER, AND MEMORANDUM

RAYMOND T. SENIOR
CLARON C. SPENCER
Senior & Senior
10 Exchange Place
Salt Lake City Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers & Wells
200 Park Avenue
New York, New York 10017
Attorneys for Great Salt Minerals & Chemicals Corporation



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ON BILL OF COMPLAINT

MOTION FOR LEAVE TO FILE MEMORANDUM IN LIEU OF EXCEPTIONS TO REPORT OF SPECIAL MASTER

Great Salt Lake Minerals & Chemicals Corporation moves the Court for leave to file the annexed memorandum in lieu of exceptions to the Report of the Special Master.

The purpose of the memorandum is to advise the Court of the special circumstance under which Great Salt Lake Minerals & Chemicals Corporation acquiesces in the recom-

mendation of the Special Master that its motions to intervene in this action should be denied.

RAYMOND T. SENIOR
CLARON C. SPENCER
Senior & Senior
10 Exchange Place
Salt Lake City Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers
& Wells
200 Park Avenue
New York, New York 10017

Attorneys for Great Salt Minerals & Chemicals Corporation

December, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ON BILL OF COMPLAINT

MEMORANDUM IN LIEU OF EXCEPTIONS TO REPORT OF SPECIAL MASTER

STATEMENT

This original action was instituted upon the complaint of the State of Utah pursuant to the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349 (Rept. 52).[1] Section 2 of the Act authorized the Secretary of the Interior to convey by quitclaim deed to the state all right, title and interest of the United States "in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake" as surveyed. It was expressly provided in Section 2 of the Act that the provisions of the Act shall not affect any valid

[1] The Report of the Special Master, filed Octoer 28, 1968.

existing rights or interests of third parties in or to lands within or below the meander line of the lake. The conveyance was effected by deed executed June 15, 1967.

As summarized by the Special Master (Rept. 6-8): the lands lying below the meander line of the lake include, in addition to the submerged lake bed, some 600,000 acres of land exposed by the recession of the water of the lake referred to as "relicted land"; all of the relicted lands and the submerged bed of the lake are claimed by the State of Utah; the United States claims some 325,574 acres of the relicted lands and private landowners claim the balance, some 275,000 acres; the claims of the United States and of private landowners overlap to the extent of some 108,780 acres; private landowners also claim the bed of the lake on the ground that the lake is not navigable.

Section 5 of the Act (Rept. 54) authorized the State to elect to pay the fair market value of the lands conveyed as determined by the Secretary of the Interior (§5(a)), or to maintain an action in this Court to determine the right, title and interest if any of the United States conveyed pursuant to §2 of the Act and to pay the fair market value therefor or the conveyance would be voided (§5(b)).

In its complaint (Rept. 57-67) the State asked that a decree be entered by this Court (1) quieting title in the State of Utah as against all claims of the United States to the bed of the Great Salt Lake located within and below the surveyed meander line of the lake; (2) specifically declaring that the United States has no right, title or interest to the lands involved or the minerals located therein (excepting land purchased and acquired from the State); and (3) perpetually enjoining the United States from further asserting any right, title or interest in the lands

or minerals and from interfering with the possession, management, or development of the lands by the State.

The United States answered (Rept. 57-65) asserting its title, and asked this Court to confirm (1) that the United States is owner of all of the lands lying below the meander line of the lake, and (2) that the State of Utah is without any title or interest in such lands save for the right to have the lands conveyed to it by the United States and to pay for them.

Motions for leave to intervene were filed by Morton International, Inc. (Morton) and by Great Salt Lake Minerals & Chemical Corporation (M & C Corporation).[2] Morton seeks to intervene as party defendant on the basis of its ownership of uplands adjacent to some of the relicted lands and on the basis of its claim to part of the submerged lake bed if it should be held that the lake is not navigable. M & C Corporation seeks to intervene as a party plaintiff based upon its status as a lessee and optionee of the State occupying part of the lands in controversy. M & C Corportion has expended approximately $11,000,000 on lands under lease and an option to lease from the State and a larger amount is committed for further expansion in the near future. In the alternative, M & C Corporation has sought to intervene as a party defendant based upon its ownership of uplands adjacent to some of the relicted lands.

After the motions to intervene were referred to the Special Master, the United States and the State of Utah, in March, 1968, entered into a stipulation (Rept. 69) intended to so limit the issues that this Court would not have to decide who, if not the State, is the true owner of the

[2] As designated by the Special Master in his Report.

lands claimed both by the United States and by private landowners such as M & C Corporation and Morton. (See the Supplemental Memorandum for the United States, page 2, filed with the stipulation.) The stipulation did not expressly put in issue the title to the brines and the minerals in solution in the brines of the lake.

The Special Master has recommended that the stipulation be modified so as to place in issue the title to the brines and the minerals in solution (Rept. 19-27), and that the motions to intervene be denied (Rept. 28-38).

POSITION OF M & C CORPORATION

I

THE DENIAL OF INTERVENTION IS SUPPORTABLE IF THE ISSUES ARE LIMITED AS PROVIDED IN THE MARCH, 1968 STIPULATION

M & C Corporation sought to intervene in this action because of the prospect that the rights of third parties would be substantially affected in the course of a determination of the claims of the State of Utah against the United States. If it had been the aim of the State in this action to identify and determine the land and mineral interests it is obliged to pay for, that is, lands and minerals owned by the United States, it would have been essential, we believe, to take into account the rights of third parties in those areas around the lake where lands claimed by private owners are also claimed by the United States.[3] It now appears, however, that the State's aim is to establish only the superiority of its title as against the United States, and that the State is willing to pay for all of the lands

[3] Map attached to March 1968 stipulation (bound with the Supplemental Memorandum of the United States of that date).

claimed by it for which it cannot establish a superior title. Paragraph 1 of the stipulation (Rept. 69) recites, in part, that:

> "the only objective of the present suit is to determine whether, *as against the United States,* the State held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967 * * *." (Emphasis supplied.)

In paragraphs 3 and 4 of the stipulation (Rept. 69-70) the State binds itself to pay the United States for all submerged lands, all relicited lands, and all brines and minerals in solution in the brines of the lake or the conveyance thereof should be null "should the State fail to establish its own superior title as against the United States."

With the issues limited to the superiority of the State's title as against the United States, and with the State agreeing, in effect, to pay for possibly more than the United States owns and, therefore, for more than was conveyed to the State, the rights of third parties would not be in issue in this action.

II

THE STIPULATION IS NOT CONTRARY TO THE STATUTE

The Act of June 3, 1966, as amended, does not say that the rights and interests of third parties are to be adjudicated in this action. We submit that there is nothing in the statute that requires the consideration of third party rights in this action if the State of Utah does not choose to place such rights in issue.

We believe that the intent of Congress, as expressed in the statute, is clear that the State may choose not to place

third party rights in issue. The bill (S. 265, 89th Cong. 2d Sess.) which become the Act of June 3, 1966, originated in the Senate Committee on Interior and Insular Affairs. As reported out by the Committee, the bill did not provide for a judicial proceeding. The essential elements of the bill, so far as they are now material, provided for a conveyance from the United States to the State of Utah and for payment by the State of fair market value as determined by a commission to be established for that purpose. (S. Rept. No. 1006, 89th Cong., 2d Sess., pp. 3-5.)

The House Committee on Interior and Insular Affairs reported out a bill (H.R. 1791, 89th Cong., 2d Sess.) which would have directed the Attorney General of the United States to institute suit against the State to determine the inerests of the State and of the United States in the controversy (H. Rept. No. 1327, 89th Cong., 2d Sess., pp. 2, 6). The Senate bill was amended in its present form in Conference (H. Rept. No. 1540, 89th Cong., 2d Sess.) and the Senate's provision for payment by the State without litigation became one of the options available to the State pursuant to the statute.

The stipulation of March, 1968 provides that the State may acquire all lands and mineral interests involved in the controversy by payment therefor if it cannot establish superior title as against the United States. (Rept. 69-70.) This is precisely the position that the State would have been in if the State had elected to pay for the land directly rather than first institute this action. Congress contemplated a payment for all lands and mineral involved as an acceptable resolution of the controversy between the State of Utah and the United States. Since the stipulation requires the State, if it is unsuccessful in this action, to pay on the same basis it would have paid under §5(a), private

interests are in no worse position than they would have been in if the State had elected to proceed under §5(a) in the first instance. The stipulation, therefore, should be allowed to be filed.

III

M & C CORPORATION SHOULD BE PERMITTED TO INTERVENE IF THE STIPULATION IS NOT FILED

If the stipulation is not allowed to be filed, the very substantial property interests of M & C Corporation, based upon its state leases and option and upon its ownership of uplands adjacent to the lands in controversy, will be involved directly in the controversy and may be adversely affected. In the event the issues in this action are not confined to those to which the United States and the State have stipulated, M & C Corporation hereby renews its motions to intervene as a party plaintiff, or, in the alternative, as a party defendant in order that its interests may be represented.

The principal for the motions to intervene in brief are these:

1. The state lands leased to M & C Corporation are claimed in part by the United States and in part by third parties.

2. Rights of M & C Corporation emanating from its ownership of uplands adjacent to the lands in controversy are disputed by the United States and by the State.

3. The State of Utah, pursuant to the terms of its leases with M & C Corporation, has no obligation to M & C Corporation to perfect its title to all or a part of the lands

in controversy and has given no assurance that it will do so. Moreover, the State of Utah refused to grant a lease for some of the land in controversy pursuant to the terms of an option which the State granted prior to the Act of June 3, 1966, and which M & C Corporation exercised in accordance with its terms.

If third party rights are to be involved in this action, there will be no effective representation of the interest of M & C Corporation without its participation as a party.

Respectfully submitted,

RAYMOND T. SENIOR
CLARON C. SPENCER
Senior & Senior
10 Exchange Place
Salt Lake City Utah 84111

ROBERT D. LARSEN
Royall, Koegel, Rogers & Wells
200 Park Avenue
New York, New York 10017

Attorneys for Great Salt Minerals & Chemicals Corporation

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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT

VERNON B. ROMNEY
Utah Attorney General
ROBERT B. HANSEN
Deputy Utah Attorney General
DALLIN W JENSEN
Assistant Utah Attorney General
RICHARD L. DEWSNUP
Special Counsel for Utah
Counsel for Plaintiff
236 State Capitol Building
Salt Lake City, Utah 84114

January 10, 1969

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AUTHORITIES CITED

This brief incorporates by specific reference the arguments, research, and citations of authority contained in Utah's earlier briefs on file with the Court. Since no new issues have been raised, no additional authorities are cited in this brief.

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IN THE

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STATE OF UTAH,

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v.

UNITED STATES OF AMERICA,

Defendant.

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE SPECIAL MASTER'S REPORT

STATEMENT OF THE CASE

Eighteen printed documents have thus far been filed with the Court. It might be somewhat confusing and burdensome for the Court to refer to these documents on file for supplementary citations of authority to sustain the arguments contained in this brief. But

Utah believes that it is preferable simply to summarize in this brief the arguments heretofore made and briefed, and to include references to the earlier briefs on file to sustain such arguments. Otherwise, it would be necessary to re-print substantial extracts from the earlier briefs on file. To aid the Court in referring to and identifying the earlier briefs, it might be mentioned that the parties have consistently followed the same color pattern for the covers of the documents filed. The documents filed by Utah have white covers, the documents filed by the United States have gray covers, the documents filed by Morton International, Inc. have light blue covers, and the documents filed by Great Salt Lake Minerals and Chemicals Corporation have medium blue covers. The report of the Special Master, of course, has a bright yellow cover.

A detailed and documented account of all prior proceedings in this case is included in the report of the Special Master. The memorandum in lieu of exceptions as filed by Great Salt Lake Minerals & Chemicals Corporation contains an excellent summary of the case. Morton International, Inc., has also stated the history of the case to the present time, although somewhat argumentatively, in its exceptions to the report of the Special Master. No useful purpose would be served by any further duplicity in detailing dates and denominations of pleadings filed and proceedings had, and Utah elects simply to state a brief summary of the background, progress and status of the instant litigation.

Since Utah obtained statehood (January 4, 1896), the water level of the Great Salt Lake has fluctuated

erratically and substantially, but has generally lowered, exposing land that earlier constituted a part of the water covered bed of the lake. In recent years, the land thus exposed has been the subject of many conflicting claims of ownership. The claimants have included the State of Utah, the United States, and private persons.

Many attempts have been made to adjudicate title, but no judicial forum could be found that had the necessary judicial power. The lack of a judicial forum was particularly frustrating to the State of Utah, because it felt a compelling economic need to develop the vast mineral potential of the brines of the lake. Since the belt of exposed land surrounding the lake necessarily had to be used to create evaporation ponds to impound brines and precipitate minerals therefrom, no development could proceed until the title uncertainty to the exposed lands was resolved.

Finally, in 1966 Congress enacted Public Law 89-441, 80 STAT. 192, directing the Secretary of Interior to convey the entire federal interest in such lands to the State of Utah, providing for certain reservations, and further providing that claims of private parties would not be affected. This conveyance was intended to be an important initial step in resolving title by removing the United States from the picture. Congress made it clear that any remaining disputes between the State of Utah and private persons as to such lands could then be negotiated or litigated subsequently, and the United States would not be involved.

As consideration for the quitclaim conveyance from the United States to Utah, Utah was required to exe-

cute in favor of the United States a quitclaim deed to all lands around the Great Salt Lake which were situated above and adjacent to the official surveyed meander line. These deeds have been exchanged. Further, Utah was required to elect either to pay the United States for all lands claimed by the United States and purportedly conveyed by its deed to Utah, or to file an original action in this Court to determine what interest the United States had in fact owned and conveyed, and thereafter to pay to the United States the appraised fair market value of any such adjudicated ownership.

Utah elected the latter option, and initated the instant litigation. Thereafter, Morton International, Inc. (herein referred to as Morton) and Great Salt Lake Minerals & Chemicals Corporation (herein referred to as M & C Corporation) sought to intervene, claiming essentially that they claimed rights and interests in the subject lands which would be prejudiced if the litigation proceeded in their absence.

Utah thought that it was clear from the complaint filed by Utah and the answer filed by the United States, that the only purpose of the present litigation was to determine the lands owned and conveyed by the United States so that Utah would know exactly what it had to pay for; and there would be no impact on, or diminution of, any private rights.

In order to make this intended result doubly clear, the parties on May 17, 1968, filed a joint motion for leave to file a stipulation which set forth the fact that neither party sought any adjudication with respect to any lands claimed by any private person. The essence

of the stipulation was simply that there would never be a point in the present litigation where there would be a need to adjudicate title to lands in which private persons claimed ownership interests.

Utah's claim is that it received title to the bed of the Great Salt Lake on January 4, 1896, when it obtained statehood. The claim of the United States is that, even admitting such initial ownership in Utah, the lake has since lowered, exposing lands that once were part of the bed of the lake but are now owned by the riparian upland owner under the common law doctrine of reliction. Utah, in response, denies that the doctrine of reliction is applicable to the Great Salt Lake. This dispute will be fully resolved in adjudicating the ownership of the United States (prior to its conveyance to Utah) of those exposed lands situated between federal public domain lands adjacent to the surveyed meander and the present water level of the lake. If the doctrine of reliction applies, then the United States has prevailed; if the doctrine of reliction does not apply, then Utah has prevailed. Any payment by Utah to the United States will depend on that determination, and that determination only.

Morton opposed the filing of the stipulation; the M & C Corporation did not. The Special Master reported that the stipulation should be amended to place in issue ownership of brines. If so amended and filed, the Special Master recommended that the motions to intervene of Morton and M & C Corporation be denied, and the litigation proceed with only Utah and the United States as parties.

Morton has filed exceptions to the Report of the Special Master, but M & C Corporation has endorsed that Report. Utah likewise endorses the Report, and by this brief respectfully urges the Court to accept, approve and adopt the Report of the Special Master as filed.

SUMMARY OF ARGUMENT

Utah opposes intervention by Morton and M & C Corporation because such intervention (1) is not required because their rights would not be affected, (2) would complicate the litigation to the point that any meaningful adjudication would be impossible, and (3) would destroy the jurisdiction of the Court.

There are five separate questions with respect to jurisdiction, all included within Point I of this brief. Two questions relate to sovereign immunity; namely, neither (1) Utah nor (2) the United States has consented to suit by the applicants for intervention. Two questions relate to the judicial power of this Court; namely, (1) there is no constitutional judicial power in original actions for suits between a state and citizens of the same state, and (2) there is no constitutional judicial power in original actions for suits between the United States and a citizen of a state. The fifth question with respect to jurisdiction is that while there is constitutional judicial power for citizens of one state to sue another state, Congress has not by statute implemented such power and the constitutional grant is not self-executing.

Of the five jurisdictional questions set forth above, the Special Master specifically concluded that three presented insurmountable obstacles which prevented intervention. He found it unnecessary to make any determination or recommendation with respect to the other two. Of the three jurisdictional obstacles so specified by the Special Master, Morton has excepted only to one, *i.e.*, that the State of Utah has not waived its sovereign immunity and has not consented to the intervention. The other two jurisdictional obstacles identified by the Special Master (and which were not excepted to by Morton) are (1) that there is no constitutional authority for private citizens to claim against the United States in original actions, and (2) that there is no constitutional authority in original actions for suits between a state and citizens of the same state.

Point II of this brief shows that no ownership interest of the applicants for intervention will be affected by this proceeding; that said applicants have no right of intervention; and that in equity and good conscience the litigation should proceed in their absence.

ARGUMENT

POINT I

INTERVENTION BY EITHER MORTON OR M & C CORPORATION WOULD DESTROY THE JURISDICTION OF THE COURT, BECAUSE:

A. TO THE EXTENT THAT PRIVATE

CLAIMANTS SEEK TO CLAIM AGAINST THE STATE OF UTAH:

1. UTAH HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY:

a. *SPECIAL MASTER'S RECOMMENDATION*: The motions to intervene should be denied because the State of Utah has not consented to intervention.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton excepts to the recommendation of the Special Master.

d. *SUMMARY*:

The Special Master has recommended at page 37 of his Report that "Morton's motion should be denied on the ground that the State of Utah has not consented to sue that corporation in this action." The same conclusion is recommended with respect to the M & C Corporation at page 38 of the Report.

Utah concurs in this recommendation of the Special Master. On Pages 35 through 37 of the Report, the Special Master discusses whether Section 78-11-9 of the Utah Judicial Code, 9 Utah Code Anno. (1953), has been repealed by implication by virtue of the subsequent enactment effective July 1, 1966, of the Utah Governmental Immunity Act, 7 Utah Code Anno. (1953), Section 63-30-1 *et seq*. The Report summarizes

the argument of Morton that the earlier consent statute has not been repealed and the argument of Utah that it has been repealed. The Special Master does not find it necessary to decide that question, because, assuming *arguendo*, that the earlier statute has not been repealed, it still is not broad enough to permit the intervention of a party defendant in a suit brought by the State of Utah. Thus, at page 37 of the Report the Special Master concludes:

> Giving the would-be intervenors the benefit of any doubt, and assuming that §78-11-9 has not been repealed, I fail to see how that section aids them here. In my opinion the consent to be sued granted by the Utah Legislature in that section does not encompass the consent to the intervention of anyone as a party defendant in a suit brought by the State of Utah or the authority to sue anyone. Nor is it to be construed as such.

While Utah believes that the recommended conclusion by the Special Master is supported by the authority cited by him, Utah further endorses its earlier argument that the prior general consent statute was repealed by the enactment of the Governmental Immunity Act, even though the Special Master found it unnecessary to decide that question. This argument is fully supported by the discussion at pages 4 through 6 contained in Utah's brief dated January 24, 1968, and at pages 13 through 17 of its brief dated February 23, 1968. A careful reading of the two statutes shows that they are directly and completely inconsistent as to remedy, jurisdiction, procedure, limitations of actions and many other respects. It is believed that the conclusion is inescapable that the comprehensive Governmental Immunity Act

effectively repealed by implication the earlier consent statute, and particularly in view of the express language of Section 63-30-6 of the Utah Governmental Immunity Act which repealed all other acts or statutes in conflict with said Governmental Immunity Act.

POINT I. A. 2.

MORTON AND M & C CORPORATION ARE CITIZENS OF STATES OTHER THAN UTAH, AND CONGRESS HAS NOT IMPLEMENTED CONSTITUTIONAL JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no specific recommendation.

b. *UTAH'S POSITION*: There is no constitutional jurisdiction in an original action for the claims asserted by the proposed intervenors.

c. *MORTON'S POSITION*: No position has been expressed.

d. *SUMMARY*:

Utah has argued that while there is constitutional judicial power in original actions for suits between a state and citizens of another state, that such judicial power had been implemented by Congress only to allow actions by a state against citizens of another state and not to allow actions by citizens of one state against another state.

The Special Master did not find it necessary to make any specific recommendation as to this point. His most relevant observation appears in the last paragraph on page 31 of his Report, as follows:

> Since the would-be intervenors are deemed citizens of a state other than Utah, the Court would have original jurisdiction over an action brought by the State of Utah against either or both of them. (Citing authority)

It will be noted that the above observations suggest only that there would be original jurisdiction in an original action for the State of Utah to sue private persons who are citizens of a state other than Utah, but there is no recommended conclusion as to whether citizens of a state other than Utah could sue Utah.

In Utah's brief dated February 23, 1968, pages 17 through 19, Utah explains the basis for this jurisdictional limitation, explaining that the act of June 25, 1948, 62 Stat. 927, 928, now codified as 28 U.S.C. Section 1251, purposely amended the judiciary act to prevent original actions by citizens of one state against another state. Neither of the would-be intervenors have questioned or challenged Utah's argument as contained in its brief of February 23, 1968.

POINT I. A. 3.

PRIVATE CLAIMANTS OCCUPYING THE SAME LEGAL POSITION AS MORTON AND M & C CORPORATION AND WHO ARE CITIZENS OF UTAH CANNOT INTERVENE.

BECAUSE THERE IS NO JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no jurisdiction in an original action for claims between a state and citizens of the same state.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: No exception has been taken by Morton to the recommendation of the Special Master.

d. *SUMMARY*:

This point might at first seem irrelevant in that neither Morton nor M & C Corporation is a citizen of Utah. But the relevance of the point lies in the fact that there are approximately 150 private persons owning land around the Great Salt Lake who assert claims identical to those which Morton seeks to assert through intervention in this action. It is thus obvious that if Morton is an indispensable party, then all other private persons similarly situated and with the same claims are equally indispensable. Since the great majority of the 150 private claimants are citizens of Utah, it is necessary to consider the jurisdictional impact of any determination which would require the inclusion of Morton and such other private claimants.

This point was raised and discussed by Utah at pages 11 through 16 of its brief dated January 24, 1968, and was further discussed at much greater length at

pages 19 through 71 of its brief dated February 23, 1968; and has been specifically adopted by the Special Master at page 31 of his Report, wherein the following conclusion is made:

> Thus the original jurisdiction of this Court is made dependent upon the character of the parties to a controversy, and the party or parties on one side must be a state or a number of states. But the party or parties on the other side of the case, citizen or citizens of another or opposing state, may not be joined to them as defendants, citizens of the same state which is bringing the action. *California v. Southern Pacific Co.*, 157 U.S. 229 (1895).

Since Utah has already devoted 59 pages of its printed briefs now on file with the Court to this very argument, and since the would-be intervenors have had an opportunity to present opposing arguments, and have not done so despite the specific adoption of such argument by the Special Master as referred to above, Utah elects simply to rely on the exhaustive coverage of this point as presented in its earlier briefs.

POINT I. B.

TO THE EXTENT THAT MORTON AND M & C CORPORATION SEEK TO CLAIM AGAINST THE UNITED STATES:

1. THE UNITED STATES HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no specific recommendation by the Special Master, because he concluded there is no constitutional jurisdiction for Morton to intervene and claim against the United States, and thus found it unnecessary to decide whether the United States has consented to suit.

b. *UTAH'S POSITION*: The United States has not consented to suit by the proposed intervenors.

c. *MORTON'S POSITION*: The United States has consented to suit by the proposed intervenors.

d. *SUMMARY*:

This point also was raised by the State of Utah at pages 6 through 11 of its brief dated January 24, 1968, and was discussed at greater length and in more detail by Utah at pages 71 through 73 of its brief dated February 23, 1968.

The Special Master found it unnecessary to discuss or to make a recommendation as to whether the United States had consented to be sued by either Morton or the M & C Corporation. This was so because the Special Master concluded at pages 37 through 38 of his Report that there was no constitutional authority for Morton, M & C Corporation or any other private person or corporation to assert a claim against the United States is an original action. Without constitutional authority to sustain a claim against the United States in an original action, the Special Master concluded that such a claim could not be sustained even if Congress purportedly gave its consent.

Utah believes that the recommended conclusion of the Special Master is correct, since it is based on Point I.B.2, next succeeding in this brief.

But it is important to emphasize that it is absolutely clear that Congress not only failed to give its consent for the United States to be sued by Morton, M & C Corporation, or any other private person or corporation, but in fact made it manifestly clear that such private corporations and persons were not to be involved in the present original action and that whatever rights they might have would not be affected by this action. See the references to Utah's earlier briefs, and particularly the excerpts from Congressional hearings as quoted at pages 8 through 10 of Utah's brief dated January 24, 1968, and pages 71-73 of Utah's brief dated February 23, 1968.

POINT I. B. 2.

THERE IS NO JURISDICTION IN AN ORIGINAL ACTION FOR CONTROVERSIES BETWEEN THE UNITED STATES AND A CITIZEN OF A STATE.

a. *SPECIAL MASTER'S RECOMMENDATION*: There is no original jurisdiction of a controversy between a private citizen and the United States.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton has not filed any exception to this recommendation of the Special Master.

d. *SUMMARY*:

This point was first raised by the State of Utah at pages 73-74 of its brief dated February 23, 1968. The argument is simply that there is no constitutional grant of judicial power in an original action for actions between the United States and a citizen of a state. This point seems very clear and is not controverted by any judicial authority. The Special Master reached this conclusion at page 31 of his Report, wherein he observed:

> It is also clear that this Court does not have original jurisdiction over a controversy between a private corporation and the United States.

While the rationale of the above conclusion of the Special Master is not explained by him in detail, it is suggested that a thorough discussion of this conclusion may be found at pages 19 through 71 of Utah's brief dated February 23, 1968, as incorporated under Point II.B.2, pages 73-74, of said brief.

POINT II

NEITHER MORTON NOR M & C CORPORATION IS AN INDISPENSABLE PARTY TO THIS LITIGATION BECAUSE:

A. THERE WILL BE NO ADJUDICATION OF TITLE AS TO ANY LANDS IN WHICH EITHER MORTON OR M & C CORPORATION CLAIMS AN INTEREST.

a. ***SPECIAL MASTER'S RECOMMENDATION***: An adjudication between Utah and the United States will not affect the claims of private parties.

b. ***UTAH'S POSITION***: Utah concurs in the recommendation of the Special Master.

c. ***MORTON'S POSITION***: Morton has excepted to the recommendation of the Special Master.

d. ***SUMMARY***:

Utah initially raised the contention that the present litigation could and should proceed in the absence of Morton and the M & C Corporation because they were not indispensable parties. This was discussed in some detail at pages 16 through 47 of Utah's brief dated January 24, 1968. Utah further discussed the fact that there would be no adjudication of title effecting any lands in which any private party claimed an interest, and that the pragmatic test of indispensability strongly suggested that the Court should proceed in the absence of private persons to adjudicate the instant controversy between Utah and the United States, said discussion appearing at pages 3 through 12 of Utah's brief dated February 23, 1968. As Utah there pointed out at pp. 3-4:

> The present action is not one to quiet title. The United States owns no part of the subject lands. Any interest which the United States owned prior to June 15, 1967, was conveyed to the State of Utah by a quit claim deed issued that date, as required by the Great Salt Lake Lands Act. Thus, it is obvious that there will

be no adjudication at all directly affecting title. Since Utah now has whatever title the United States had, Utah will still have the same title after the litigation is concluded. Any decree which might be rendered in this action will have absolutely no affect on the status of the title, but will only determine whether Utah is required to pay the United States for land purportedly conveyed by the deed. That will be the impact, and the only impact, of this litigation.

The United States claims that it owned and quit-claimed to the State of Utah approximately 433,000 acres of reliction lands. Utah denies that these lands are reliction lands, and thus denies that the United States had any ownership interest to convey. So, while Utah acknowledges that it has received by conveyance whatever interest the United States had, Utah claims that it actually received nothing under the deed and should pay for nothing.

POINT II. B.

THE PRAGMATIC TEST OF INDISPENSABILITY DICTATES THAT THE COURT SHOULD PROCEED IN THE ABSENCE OF MORTON AND M & C CORPORATION:

a. *SPECIAL MASTER'S RECOMMENDATION*—The Court should proceed in equity and in

good conscience to settle the differences between Utah and the United States in the absence of the proposed intervenors.

b. *UTAH'S POSITION*: Utah concurs in the recommendation of the Special Master.

c. *MORTON'S POSITION*: Morton has excepted to the recommendation of the Special Master.

d. *SUMMARY*:

The Special Master has concluded that Morton and M & C Corporation are not indispensable parties. The following quotations from his report are illustrative.

At page 40:

> It is clear that the Court should proceed to decide the case in the absence of Morton et al. and not dismiss.

At pages 46-47:

> Without elaboration, the public and the courts have an interest in having the question of title over the relicted land decided. If it cannot be done as to all the persons in interest — at least a start in having it decided should be made. The matter is here. The Court should not lose the opportunity to get the ball rolling at least. Deciding the matter as between the State of Utah and the United States will be a big step in that direction.
>
> But even if Morton et al. had a more direct interest in the subject matter of this litigation, the interest of the State of Utah and, incident-

ally, the United States, the public and the courts in having this litigation completed far outweigh that of the private corporations to intervene herein.

From the foregoing, in my opinion, it is equitable and in good conscience to proceed to adjudicate the controversy between the State of Utah and the United States in the compelled absence of Morton and M & C Corporation. It is therefore submitted that this Court not dismiss the action on "indispensable" party grounds and permit the State of Utah and the United States to proceed to the merits of this action.

The conclusion of the Special Master, as thus reported to this Court, is fully supportable. It is within the sound discretion of this Court to determine whether Morton is indispensable. Such discretion is to be exercised after viewing all relevant considerations of a practical and equitable nature.

It is thus necessary to examine the particular facts of the case at bar, itemizing the major equitable factors which make the instant case strikingly unique and which present a compelling argument for continuing the litigation in the absence of Morton. The following summary is quoted from pages 41 through 47 of Utah's brief dated January 24, 1968:

1. The Nature of the Controversy is Highly Unusual.

The Great Salt Lake, in and of itself, is unique. While not the only "dead sea" in the world, it is the only inland salt sea where the slightest fluctuation in water level has such a profound impact on new land inundated or

new land exposed. The actual lands in dispute have no significant inherent value, but the brines in the lake have a very substantial mineral value. The mineral lessees of the State of Utah cannot effectively extract minerals from the lake without building expensive extraction facilities on the lands adjacent to the lake. It is, therefore, necessary to obtain title security to the exposed lands around the lake and the brines in the lake in order to develop and extract the minerals from the lake brines.

2. There is no other Forum Available to Determine the Present Controversy Between Utah and the United States.

If Morton and the other private claimants similarly situated are determined to be indispensable parties and the case thus had to be dismissed for lack of constitutional jurisdiction, then it necessarily follows that there is and can be no other forum for litigation of the respective claims to the lands in question. This is so because the claims of the United States would not be determined or resolved, and the United States would appear to be just as indispensable to any action in the state courts of Utah as Morton would be in this action. Congress would be without power to enact new legislation to provide consent for the United States to be sued in the federal district court of Utah, for there would be no constitutional jurisdiction for a quiet title action between a state and its own citizens in

the federal district courts. If the present action were to be dismissed, there would thus be no state or federal court which would or could have jurisdiction over all of the indispensable parties. Neither the Utah Legislature nor the United States Congress could by legislation provide a forum. The present vexation and crippling uncertainties would persist —perhaps forever!

3. The Need to Settle the Present Controversy Between Utah and the United States has been Demonstrated by the Legislative and Executive Branches of both Governments.

The crying need for an adjudication to settle the differences between Utah and the United States has been vividly demonstrated by the affirmative involvement of the legislative and executive branches of both Utah and the United States governments. With respect to the legislative branch of the United States Government, Congress has specifically enacted the Great Salt Lake Lands Act to provide for the current litigation; and with respect to the legislative branch of the Utah Government, the Utah Legislature has specifically consented to the provisions of the federal act and has specifically authorized the present litigation.

The executive branch of the United States Government became directly involved when

the Department of Interior reported to Congress an immediate need for the legislation to allow resolution of the title problems (Senate Hearings, *op cit, supra,* page 11), and when President Lyndon B. Johnson, prior to signing the Great Salt Lake Lands Act into law, initiated a discussion with Governor Calvin L. Rampton with respect to the provisions and impact of the bill. Similarly, the executive branch of the Utah State Government became deeply involved when, at the Congressional hearings with respect to the Great Salt Lake Lands Act, Governor Calvin L. Rampton testified to the urgent economic needs of the State which were being seriously hurt by the delay in resolving title uncertainties (Senate Hearings, *op cit, supra,* pp. 14-15), when the Utah Land Board testified to the injurious effect on mineral leasing (Senate Hearings, *op cit, supra,* pp. 45-50), when the Utah Fish and Game Department testified to the injurious impact on valuable waterfowl resources which serve waterfowl feeding and resting needs for large numbers of birds that migrate as far as from Russia to South America (Senate Hearings, *op cit, supra,* pp. 50-60), and when the Great Salt Lake Authority testified to the injurious impact on its attempt to develop swimming, boating and other recreational facilities along the lake (Senate Hearings, *op cit, supra,* pp. 60-69). Certainly there could be few, if any, parallel examples which

would match the instant case as to the injurious mineral, industrial, waterfowl, recreational and related impacts sustained by a state as a result of lack of a forum to litigate. Or, for that matter, it would be difficult to find many examples where both the state and national governments, through both legislative and executive involvement, exerted such strenuous efforts to provide a means for litigation to resolve the controversy.

4. Inclusion of Morton and the other Private Persons Would Create a Complexity Incapable of Adjudication.

The present litigation, if only Utah and the United States are involved, will be reasonably simple and will be capable of an expeditious determination. But to include the private claimants as parties would cause the case to assume such a cumbersome complexity as to make any effective adjudication totally impossible. This is so because many of the private claimants have peculiar legal positions in relation to the claims and defenses which would be asserted against them by the State of Utah but which would not be asserted by the State of Utah against the United States. These claims and defenses would include statute of limitations, laches, estoppel, boundary-line agreements, boundaries by acquiescence, res adjudicata, purchase, and others. In most instances, substantial discovery would

have to be done, including the taking of numerous depositions, where no one except Utah and a particular private claimant would be involved.

This is to say that in many instances the claims and defenses between the State of Utah and a single private claimant would assume the proportions of an entire lawsuit, including little in common with any of the other private claimants or with the United States. It is admitted that the position of Morton is less complex than would be the position of many other private claimants, and the issues between Morton and the State of Utah would be simpler than in many other instances between Utah and other private claimants.

But, even with Morton, the trial would not be a simple matter. To illustrate the genuineness of the present claim of complexity, the answer and counterclaim filed by Utah against Morton in Civil No. C-127-66, United States District Court for the District of Utah, is useful. In that pleading there are thirteen defenses and a counterclaim in two counts. Beyond the issues now in this action between Utah and the United States, it would appear that if Utah were required to litigate with Morton and if the same issues were here raised as were raised in the federal district court, this Court would be required to determine estoppel, estoppel from denying title of landlord, latches, four separate defenses relat-

ing to statutes of limitation, and construction of a lease agreement between Utah and Morton. If the litigation progressed it would certainly get more involved than that, and, as said above, Morton's position is relatively simple compared with many of the approximately 150 private claimants.

Further, if the private claimants were to be included, and if this Court were to limit the adjudication to a "quiet title" action of the land claimed by the United States—and that only—it would be but a piece-meal litigation. There would be no resolution of conflicting claims *between private owners* as to lands claimed by the United States, nor would there be any resolution of ownership in those areas where the United States does not claim title. In other words, to include the private claimants would be to add a fantastic complexity to the present litigation without accomplishing anything near "complete and final" justice, even for the parties before the Court.

The foregoing discussion, with respect to the complexity and involvement of the litigation if the private claimants were to be included as indispensable parties, is moot in the sense that this Court would not have jurisdiction to proceed to any adjudication if private claimants were to be made parties to this action. But this illustration of complexity, as well as the earlier discussion relating to the great

harm to be suffered by everyone unless some relief is afforded in this action, is simply to show particular facts which should be carefully weighed by a court of equity in determining whether the private parties should be termed indispensable.

5. Any Rights or Interests of Morton, M & C Corporation, and any other Private Claimants Can be Protected in Their Absence.

It is true that if any of Morton's property rights were to be impaired or destroyed by this action, in the absence of Morton, then it obviously would be unconstitutional to proceed to that result. But that is not the case here. Utah in its complaint has prayed only that the Court determine the respective interests between it and the United States. Congress has specifically said that private rights and interests shall not be affected by this action. Surely, any decree or judgment entered by this Court can and must be shaped and drafted so as to incorporate the protective legislative language and to provide specifically that any and all claims of private parties shall be preserved and shall be unaffected by the decree, and that the adjudicated rights of the State of Utah and the United States shall in no way be construed to impair or diminish the claims of private owners.

If the complaint asks nothing of Morton, if Congress says Morton's rights shall not be

affected, and if the United States Supreme Court says that Morton's rights are not to be affected—then it is difficult to see how or by whom Morton's rights will be affected.

CONCLUSION

The present litigation should proceed in the absence of Morton and M & C Corporation. Any claims or interests of Morton or M & C Corporation can be fully protected in their absence, and there will be no adjudication in this action which will have any affect or impact on their claims or rights. The only conceivable interest of Morton and M & C Corporation is that there may be common questions of law and fact, but to the extent that any such question or questions exist, both Morton and M & C Corporation will be adequately represented by either the State of Utah or the United States of America, depending on the particular interest that such would-be intervenors would have with respect to any such common question of law or fact. And, in any event, any adjudication in this action will not be binding on any absent persons and will not be *res adjudicata* as to them.

Utah's resistance and opposition to intervention by Morton and M & C Corporation is not based on a desire to keep those persons out of the present litigation simply for the purpose of preventing them from participating as parties in this action. The basic and fundamental reasons are both practical and legal. The practical objection of Utah is that to include the would-be

intervenors as parties would necessarily require the inclusion of approximately 150 other private persons who are similarly situated, and would thus make the present litigation so complex, involved and cumbersome as to make any meaningful adjudication impractical, if not impossible. The legal objection is that a determination that Morton and M & C Corporation are indispensable parties would divest the court of jurisdiction to proceed to any adjudication, for the five separate and independent jurisdictional obstacles set forth above.

Utah desires to obtain an expeditious and meaningful determination of the lands, if any, for which it must make payment to the United States. Utah wishes to proceed in accordance with the plain intent of the United States Congress and the Utah Legislature, and to avoid making the litigation complex or burdensome, and to avoid anything that would destroy the jurisdiction of the Court and thus prevent the needed adjudication. Utah fully supports the Report of the Special Master, since it is entirely in accord with the positions heretofore expressed by Utah. Utah does not object to the recommendation of the Special Master that ownership of the brines and minerals should be placed in issue to avoid any subsequent claim by the United States to compensation for such brines and minerals, since Utah desires certainty of title as to the brines as well as the lands, and believes that the United States had simply hesitated to put ownership of the brines in issue because it had not found any meritorious theory supported by facts pursuant to which it could claim ownership of such brines.

In any event, Utah respectfully urges the Court to accept and adopt the report of the Special Master as filed, and thus permit Utah and the United States to proceed to an early adjudication to determine what ownership interests, if any, were owned by the United States and conveyed to Utah, and for which Utah must make payment.

Respectfully submitted,

VERNON B. ROMNEY
Utah Attorney General

ROBERT B. HANSEN
Deputy Utah Attorney General

DALLIN W. JENSEN
Assistant Utah Attorney General

RICHARD L. DEWSNUP
Special Counsel for Utah

Counsel for Plaintiff

236 State Capitol Building
Salt Lake City, Utah 84114

January 10, 1969

CERTIFICATE OF SERVICE

I, Robert B. Hansen, Deputy Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C., 20530; Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D.C. 20006, attorneys for Morton International, Inc.; and Raymond Senior, 10 Exchange Place, Salt Lake City, Utah 84111, and Robert D. Larsen, 1730 K Street, N.W., Washington, D.C., 20006, attorneys for Great Salt Lake Minerals and Chemicals Corporation; by mailing the same, air mail postage prepaid, to their respective offices, this 10th day of January, 1969, all in accordance with the Rules of this Court.

ROBERT B. HANSEN
Deputy Attorney General
State of Utah

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330-983—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES ON REPORT OF SPECIAL MASTER AND EXCEPTIONS THERETO BY MORTON INTERNATIONAL, INC.

On October 28, 1968, the Special Master in this case filed with the Court his Report recommending that the State of Utah and the United States be granted leave to file their Stipulation of March 29, 1968, that the Motions for Leave to Intervene filed by Morton International, Inc. and Great Salt Lake Minerals and Chemicals Corporation be denied, and that the Court permit the State of Utah and the United States to proceed to litigate as between themselves which of them has superior title to the lands and minerals below the meander line of the Great Salt Lake. Morton

has filed exceptions to the Report.[1] The United States submits that those exceptions should be rejected and the recommendations of the Special Master approved.

STATEMENT

Although this original action is still at the threshold stage, some twenty printed documents have been filed, three hearings have been held before the Special Master, and the Court itself has entered six orders in the case.[2] What is more, in the almost two years since the Motion for Leave to File a Complaint was submitted, some of the parties and would-be parties have changed positions. Accordingly, in an attempt to simplify the Court's task in ruling on the initial Report of the Special Master without the necessity of studying all the previous filings, we shall here re-state the relevant facts and prior proceedings in summary form.

[1] Great Salt Lake Minerals and Chemicals Corporation, in a *Memorandum* accompanying its *Motion for Leave to File Memorandum in Lieu of Exceptions to Report of Special Master*, states that it agrees with the conclusions of the Special Master, but that it should be permitted to intervene in the event this Court should strike the Stipulation between the State of Utah and the United States. We do not quarrel with this submission.

[2] See the list of "Relevant Docket Entries" appended to the Report of the Special Master, pp. 49–51, to which should be added the *Exceptions* filed by Morton on December 12, 1968, the *Memorandum* filed on the same date by Great Salt Lake Minerals & Chemicals Corp., and the *Brief* in support of the *Special Master's Report* filed by Utah on January 13, 1969. We note, however, that some of the dates shown on that list are rather deceptive. Thus, although both the *Memorandum for the United States* and the *Reply Memorandum for the United States* indicated as filed on February 20, 1968 (see Report, p. 50)

1. Beginning in the 1850's, various portions of the public lands adjoining the Great Salt Lake were surveyed, with a meander line approximating the shore of the Lake as it then existed. Although the level of the Great Salt Lake has fluctuated over the years, its general trend has been downward. As a result, the meander lines, drawn for the most part years ago, are in some places thousands of feet, and elsewhere several miles, inland of the present water line of the Great Salt Lake. Ownership of these relicted lands between the meander line and the water's edge (approximately 600,000 acres) is the principal subject matter of this controversy. Also at issue are the presently submerged lakebed and the brines and minerals in solution in the brines of the Lake. No acreage upland of the meander line is involved.

The State of Utah claims all these lands and minerals under the doctrine of *Pollard* v. *Hagan*, 3 How. 212, as part of the original bed of the Great Salt Lake,

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were formally filed with the Clerk of this Court on that date, the first was submitted to the Special Master and served in typewritten form in January and in printed form on February 5, while the second was submitted and served (in printed form) on February 7. So, also, the *Supplemental Memorandum for the United States and Stipulation* shown as filed on April 22, 1968 (Report, p. 51), was in fact submitted to the Special Master and served in March. Finally—presumably because they were never filed with the Clerk of the Court—the Report omits all notation of the government's *Response to Motion of Morton International, Inc. to Intervene as Defendant*, submitted and served on November 1, 1967, and of a substantial unprinted Memorandum submitted by the State of Utah on February 5, 1968.

The Court's orders in the case are reported at 387 U.S. 902, 388 U.S. 902, 389 U.S. 909, 390 U.S. 977, 391 U.S. 962, and 393 U.S. 921.

which it asserts is now, and was at the time of the State's admission to the Union in 1896, a navigable body of water. Independently of the navigability or non-navigability of the Lake, private patentees from the United States who own lots on the meander line claim the presently exposed acreage adjoining their lands under the common law doctrine of reliction. Invoking the same principle, the United States, as littoral owner, claims the balance of the "relicted" acreage—some 325,000 acres. See *State of Utah,* 70 I.D. 27 (1963). Moreover, wherever the water line was a substantial distance from the meander line at the time of the issuance of a patent, the United States claims the appurtenant relicted lands as the true littoral owner under the so-called *Basart* doctrine. See *Madison* v. *Basart,* 59 I.D. 415 (1957).[3] It is with respect to these *Basart* lands—alone of the exposed acreage—that the United States and the private landowners advance conflicting claims.[4] In addition, disputing the navigability of the Lake, the United States and some of its patentees have advanced claims to the presently submerged lands and minerals of the Lake.

Attempts to settle by legislation this controversy between the State of Utah and the United States

[3] The several categories of claims are well explained in an illustrative diagram included in the Special Master's Report (p. 9). The areas indicated as (7) and (8) thereon constitute lands claimed by the United States under the *Basart* doctrine.

[4] The presently uncovered lands claimed by the United States below the meander line of the lake are identified on the map included at the end of this memorandum (the same map was attached to the Stipulation entered into by the United States and the State of Utah in March 1968).

resulted in the passage of the Act of June 3, 1966, Public Law 89–441 (80 Stat. 192).[5] Section 1 of the Act directed the Secretary of the Interior to complete the public land survey around the Great Salt Lake by closing the meander line "following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed areas." After that task was performed—as it has been—Section 2 directed the Secretary to convey to the State of Utah "all right, title, and interest of the United States in lands * * * lying below the meander line of the Great Salt Lake * * *." This was accomplished by a quitclaim deed executed June 15, 1967. Section 5 then required the State either to pay the fair market value of the lands conveyed to it, or to maintain an action in this Court "to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 * * *," the United States consenting to be joined as a defendant to such an action. The State elected to initiate this action. See laws of Utah, 1966, 2d Spec. Sess., ch. 11.

2. On March 1, 1967, the Attorney General of the State of Utah filed in this Court a Motion for Leave to File a Complaint, and a Complaint (Report, pp. 57–68). The only defendant named in the complaint is the United States. On May 15, the Court granted the State of Utah's Motion for Leave to File (387 U.S.

[5] The full text of the Act is reproduced in the Appendix to the Special Master's Report, pp. 52–56.

902), and on June 12, appointed a Special Master (388 U.S. 902). On July 14, the United States filed an Answer to the State's complaint (Report, pp. 57–65). In September, Morton International, Inc., a Delaware corporation, filed a motion for Leave to Intervene as a defendant in the matter, together with a proposed Answer to the Complaint of the State of Utah, claiming certain lands and minerals below the meander line of the Great Salt Lake which both the United States and Utah claim to own. On October 23, the Court referred Morton's Motion to the Special Master (389 U.S. 909). Subsequently, on January 24 and February 19, 1968, Great Salt Lake Minerals & Chemicals Corporation, another Delaware corporation, filed alternative Motions to Intervene as Plaintiff or Defendant, and those motions were likewise referred to the Special Master (390 U.S. 977). Presumably, other similarly situated landowners—most of them citizens of Utah—would also seek to intervene if the pending motions were granted. It is this question of intervention which has provoked all the subsequent proceedings and which is now presented to the Court.

3. The State of Utah has consistently opposed these motions for intervention, maintaining that the applicants were not indispensable parties and that the doctrine of sovereign immunity precluded the filing of their claims as, in effect, unconsented suits against the State and the United States. In addition, Utah has argued against the intervention of the present applicants, foreign corporations, on the ground that similarly situated landowners who are citizens of the

State—whose joinder would logically follow—cannot be made parties to this action without ousting the Court's original jurisdiction.[6] The United States, on the contrary, initially suggested that all the littoral landowners claiming relicted lands (or portions of the lake bed) adversely to the United States were indispensable parties, and that neither sovereign immunity nor constitutional limitations on the original jurisdiction of the Court barred their intervention.[7] Upon the execution of a Stipulation (discussed below), however, the United States changed position and opposed the motions for intervention,[8] now viewing the applicants as neither indispensable nor necessary parties—albeit we never joined Utah in urging sovereign immunity or lack of original jurisdiction as a bar.

In March 1968, the United States and the State of Utah entered into a Stipulation (Report, pp. 69–72). By that declaration, Utah agreed to pay the United

[6] See *Brief of the State of Utah in Opposition to Motion by Morton International, Inc. for Leave to Intervene and Answer*, filed January 25, 1968, and *Brief of the State of Utah in Response to the Rep'ly Briefs of the United States, the Reply Brief of Morton International, Inc., and the Motion and Brief to Intervene by Great Salt Lake Minerals and Chemicals Corporation*, filed February 24, 1968.

[7] See *Memorandum for the United States*, dated January, 1968; *Reply Memorandum for the United States*, dated February, 1968; and *Memorandum for the United States in Response to Motion and Amended Motion of Great Salt Lake Minerals and Chemical Corporation*, dated February, 1968. (As already noted, some of these documents were submitted to the Special Master on the dates indicated, but only later filed with the Clerk of the Court, see note 2, *supra*).

[8] See *Supplemental Memorandum for the United States*, submitted with the Stipulation in March, 1968.

States for any lands and minerals conveyed under Public Law 89–441 with respect to which it is unable to establish its own superior title—without requiring the United States to prove its title as against other claimants. The Stipulation purported to foreclose decision of any other question (¶ 1, Report, p. 69), specifically removing from controversy the so-called *Basart* lands (the only exposed acreage claimed by the United States which private landowners also claimed) by providing that, so far as the sovereigns were concerned in settling their dispute, they would follow the result with respect to other relicted lands (¶¶ 4 and 5, Report, p. 70), and also avoiding determination of any conflicting claims in the present lakebed and minerals of the Lake as between the United States and private claimants by providing that Utah will pay the United States for *all* the resources of the Lake without requiring proof of title if the State's own claim fails (¶ 3, Report, pp. 69–70). Finally, it was expressly provided that "In no event shall the judgment herein be taken as adjudicating or affecting the title of persons or corporations claiming lands (uncovered or submerged), brines or minerals below the meander line of the Great Salt Lake, whether those which the United States claims to have owned prior to June 15, 1967, or others" (¶ 6, Report, p. 71). In our view, this narrowing of the lawsuit rendered the intervention of private landowners claiming adversely to the United States both unnecessary and inappropriate, and we so advised the Special Master.

As we have already noted, by his Report submitted October 10, 1968, and ordered filed October 28 (see 393 U.S. 921), the Special Master has recommended that the Stipulation be filed (with one minor modification)[9] and that the motions to intervene be denied. Although differing as to some of their reasons, both the United States and the State of Utah support the Special Master's disposition. Great Salt Lake Minerals & Chemicals Corporation has, in effect, acquiesced in his recommendations, while Morton has filed the Exceptions now before the Court.

ARGUMENT

Constitutional limitations on the original jurisdiction of the Court aside, the outer boundaries of this lawsuit are fixed by Public Law 89–441. That Act is the sole basis for this action against the United States, which otherwise would be barred by the principle of sovereign immunity. Any adjudication beyond what is necessary to achieve the purposes of the Act would be unauthorized as overstepping the limited consent to suit which only Congress could grant. Cf. *United States* v. *Sherwood,* 312 U.S. 584, 586; *Dale-*

[9] By paragraph 2 of the Stipulation the United States sought to defer the decision whether it could properly claim to have owned and conveyed to the State on June 15, 1967, the presently submerged lands underlying the lake and the brines and minerals in the lake, and Utah sought to reserve the right to object to adjudication of interests below the present water line in this case (see Report, pp. 69–70). The Special Master ruled that the United States *must* contest the State's claims to the resources of the Lake in this action (see Report, pp. 23–27). Both Utah and the United States have now acquiesced in that amendment of their Stipulation.

hite v. *United States,* 346 U.S. 15, 30. Accordingly, it is important, at the outset, to focus on the text and objective of Public Law 89–441.

The scheme of the Act is significant. With exceptions not relevant here, the United States was required at all events to relinquish to the State all its claims below the meander line of the Great Salt Lake (§ 2, Report, p. 69). Thereupon, the State could voluntarily pay the price fixed by the Secretary of the Interior as representing the value of lands and minerals which the United States asserts it owned before the conveyance, or it could "maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act" (§ 5, Report, pp. 54–55). In short, the congressional solution to the longstanding controversy between the two sovereigns over the area once encompassed by the Lake was to quiet the State's title to the disputed acreage against the United States, subject to a later payment which could be litigated here.

Very plainly, Public Law 89–441 was not intended to provide a forum for the adjudication of *all* disputes over lands and minerals below the meander line of the Lake. Had Utah chosen to pay without litigation, there would be no arguable basis for Morton or any other littoral landowner to invoke the Act as a predicate for judicially clearing its title—whether against the State or the United States.[10] Nor does the action

[10] Unless Utah were a party, no such action would lie in this Court, since it is the presence of the State—not the presence

authorized automatically offer all claimants an opportunity to test their claims. It is only "the right, title and interest of the United States" (before the conveyance to the State) that may be adjudicated. The private landowners cannot seize this occasion to settle their disputes with the State, whether the State is willing or not. Interests asserted in lands claimed by the State but not by the United States are wholly irrelevant to the only purpose for which this suit was sanctioned—to determine which lands and minerals, if any, Utah in fact acquired by conveyance from the United States and must pay for.

Indeed, it is arguable that because the Act in terms authorizes only "the State" to institute an action against the United States, no other claimant may appear to challenge the title of the United States—especially since it is expressly stated that "the provisions of this Act shall not affect * * * any valid existing rights or interests, if any, of any person, partnership, association, corporation, or other nongovernmental entity, in or to any of the lands within and below [the] meander line [of the Great Salt Lake]" (§ 2, Report, p. 52). That, however, seems to us too grudging a reading of the legislation, and one that would defeat

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of the United States—that brings the case within the original jurisdiction of the Court. In light of the Eleventh Amendment and the doctrine of *Hans* v. *Louisiana*, 134 U.S. 1, the landowners could join Utah as a defendant in a federal court only if the State had consented. Even assuming that hurdle were overcome, joinder of the United States as a defendant—the only predicate for federal jurisdiction—would seem to encounter the bar of sovereign immunity which Public Law 89-441 lowers only for the benefit of the State if it chooses to initiate an action here.

its purpose, so long as Utah itself is free to contest the ownership of the United States, and its obligation to make payment, by setting up (at least alternatively) the title of a private claimant. In that situation, if the claims of private landowners (notably to the *Basart* lands) were to be adjudicated (as against the United States), those landowners must, we believe, be viewed as indispensable parties, or, at least, as "necessary" parties whose joinder should be effected unless it would oust the Court's jurisdiction (which is not the case in our view). See Rule 19, F.R.Civ.P. It was on this premise that we initially supported the intervention of Morton and M & C Corporation and suggested the joinder of the other littoral landowners claiming lands or minerals also claimed by the United States.[11]

As it turned out, however, our premise was mistaken. Utah insists that it never sought by this action to quiet its own title below the meander line of the Lake except as against the United States and that it never intended to require the United States to establish its title against all claimants, but was always ready to acknowledge federal ownership (before the recent

[11] Under our present submission, it is unnecessary to resolve the question whether joinder of the littoral landowners (or those of them who are citizens of Utah) would oust the Court's original jurisdiction. So, also, if the Stipulation is accepted, it is no longer necessary to decide whether the Eleventh Amendment or principles of sovereign immunity bar the landowners from challenging Utah's title, since the State had now made it clear that it does not seek an adjudication quieting its title against all claimants. Nevertheless, since these questions will recur if the Court disapproves the Stipulation, we reprint in an Appendix (*infra*, pp. 23–29) our earlier submission on these points (with only slight editing).

conveyance) of the lands claimed by the United States, and to pay for them, if it failed to prove the State's superior title. Whether or not this is a correct construction of the Complaint originally filed, the State has now formally declared its intention so to confine the issue by executing the Stipulation of March 1968. The consequence, we believe, is that the intervention of the private landowners claiming adversely to the United States is no longer necessary or appropriate, if, indeed, it is permissible in the prevailing circumstances.

Thus, it is apparent that the question of the validity of the Stipulation is critical. We discuss that matter first, and then elaborate our conclusion that, in light of the Stipulation, the proposed interventions ought not be allowed.

A. THE STIPULATION IS VALID AND EFFECTIVE

If this were an ordinary lawsuit in any other court, we do not suppose anyone would question the power of the only two parties to limit the issues between them by stipulation. As we understand the Exceptions filed, Morton argues that the present Stipulation is unauthorized (1) because—unlike conventional litigation—the scope of this legal action is controlled by a special Act of Congress, and (2) because—unlike a lawyer for a private client—the Solicitor General cannot, without an express congressional mandate, bargain away a property claim of the United States. We submit that neither objection is well taken.

1. The first challenge to the Stipulation is that it avoids an adjudication of the title of the United States to the lands it claims under the *Basart* doc-

trine, the State of Utah having undertaken, without further contest, to pay for the conveyance of those lands if it should fail to establish its superior title to the other relicted acreage claimed by the United States (see Stipulation, ¶ 4, Report, p. 70),[12] and the United States having agreed to disclaim payment for these lands if it should not prevail as to the balance of the exposed lands disputed between the two sovereigns (see ¶ 5, Report, p. 70). This, Morton argues, is inconsistent with Public Law 89–441 which, it is said, "requires a judicial determination of all that the United States claims to own in lands, brines and minerals lying below the meander line of the lake which have been conveyed to Utah, including the Basart claims" (Exceptions, p. 35).

The short answer is that the Act which authorizes this action imposes no such inflexible requirement. Nothing in the text of the statute compels the State to contest *all* the claims of the United States, or none. Nor would such an all-or-nothing rule be consistent with the scheme of the Act. Public Law 89–441 explicitly provides for payment without any contest whatever. Solely for the State's benefit, sovereign immunity is waived and a judicial forum is afforded to permit Utah to challenge the federal claims before paying, if it chooses. In this situation, it seems ob-

[12] Now that the United States has been required to claim the presently submerged lakebed and the minerals of the Lake, the same objection presumably applies to ¶ 3 of the Stipulation (Report, pp 69–70), whereby Utah undertakes, without further contest, to pay for all relicted lands claimed by the United States (including the *Basart* acreage) if the State should fail to establish its superior title to the present lakebed.

vious that the State was left free to contest so much or so little as it thought proper.

Certainly, Utah could have determined to contest the *Basart* claims of the United States, since, unless the federal title were established, it might ultimately be required to relinquish those lands to private owners, or pay their value a second time. But we cannot appreciate why Utah should not be free to forego that challenge. Some of the littoral landowners are understandably disappointed that the *Basart* claims—which have now inured to Utah—should not be finally adjudicated. Yet, Public Law 89–441 was not enacted for their benefit and the State might have forestalled all judicial proceedings had it chosen to pay voluntarily. In sum, as the Special Master concluded (Report, p. 45), the applicants for intervention have no cause to complain since they are "in no wise worse off now than before this action was instituted."

2. The suggestion that the Solicitor General is acting "beyond [his] power" in purporting to "relinquish Federal rights in lands without compensation" (Exceptions, p. 37) merits little discussion.

Morton's charge is predicated on Paragraph 5 of the Stipulation (Report, p. 70), already adverted to, by which the United States agrees to forego payment for the *Basart* lands if Utah should succeed in establishing its superior title to the other uncovered lands below the meander line (designated "public domain reliction lands"). We so agreed because it seems to us that the consequence follows inexorably. If we are correct in this, then, of course, there is no "give-

away" of federal lands, but merely a harmless concession that night follows day.

The legal situation is as follows: Utah has no basis whatever for any claim below the meander line (whether presently submerged or exposed lands) unless the Lake was navigable on the date of statehood in 1896. Recognizing this, the State has agreed to forego further contest if it is unable to prevail with respect to the present lakebed and minerals of the Lake (Stipulation, ¶ 3, Report, pp. 69–70). The converse does not hold true, however: even though Utah succeeds in its claim to the present lakebed, that does not automatically establish its title to the uncovered lands below the meander line. To this extent, Morton is quite correct in stating that "this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability" (Exceptions, p. 37). The remaining question (assuming the Lake is held navigable) is whether (as the United States and Morton contend) the gradually uncovered lands inured to the littoral landowners under the doctrine of reliction—which of course applies on navigable bodies of water (*e.g., Jones* v. *Johnston,* 18 How. 150, 156; and see *Hughes* v. *Washington,* 389 U.S. 290, 293). If that inurement occurred, Utah lost all the uncovered lands as they became exposed.[13] On the other hand, if Utah owned the lakebed and the doc-

[13] Of course, with respect to the *Basart* lands, a question remains as to whether they inured to the United States or to the private patentees. But that is the issue Utah is willing to leave undecided in this action by agreeing to pay the United States for any lands as to which it cannot establish its own title. See *supra*, pp. 8, 13–14.

trine of reliction is not operative, then the United States acquired nothing by virtue of the recession of the Lake—whether *Basart* lands or other uncovered acreage. That is what the challenged provision of the Stipulation recognizes.

Morton has sought to introduce a complicating factor by suggesting that the Court may ultimately find that the meander line on which the Stipulation is based does not accurately represent the edge of the lake on the date of statehood and may hold that Utah is entitled only to the presently exposed lands below the 1896 high water line. The result, it is said, would be to partition both the *Basart* lands and the remaining uncovered lands claimed by the United States between the two sovereigns. We do not appreciate the difficulty.

At the outset, it must be said that Morton's hypothesis is somewhat far-fetched. Moreover, whatever limitations there may be on the powers of the Solicitor General to "relinquish Federal rights in lands," there can be little doubt that he would not be overstepping his authority to conduct litigation for the government in this Court (see 5 U.S.C. 309; 28 C.F.R. 0.20) if he were to join in a stipulation accepting the meander line indicated on maps of the area as representing the bank of the Great Salt Lake in 1896.

Even assuming, however, that the true 1896 line becomes relevant and is judicially established at some distance below the meander line, no insuperable problem is presented. Indeed, the fair import of the Stipulation entered into between Utah and the United

States is simply that, for purposes of this case and the State's obligation to make payment, the lands claimed by the United States under the *Basart* doctrine shall be treated as though they were in the identical posture of the other exposed lands claimed by the United States. Thus, if it were held that the United States acquired the uncovered lands claimed as "public domain reliction" to the 189[illegible] edge of the Lake, but no further, it would follow, under the Stipulation, that the United States must be deemed to have also acquired the lands claimed under *Basart* to the same point only. On the side of the United States, this result involves no concession whatever: as a matter of law, if the inurement of the exposed former lakebed to the upland owner stopped in 1896, then the United States acquired nothing by reliction below that line, whatever the theory under which it claims to be the upland owner.

B. THE STIPULATION MAKES THE JOINDER OF THE PROPOSED INTERVENORS UNNECESSARY AND INAPPROPRIATE

What has already been said sufficiently elaborates our view that the Stipulation entered into between the United States and Utah so substantially changes the case as it affects the would-be intervenors that, although once indispensable parties, they are no longer necessary or even appropriate parties.

The critical fact, we repeat, is that—under the Stipulation—there will be no adjudication, directly or indirectly, of the claims of the private landowners which are adverse to the United States, because the

United States is no longer required to establish a clear title. Specifically, the dispute between the United States and its patentees as to the validity and applicability of the *Basart* doctrine will remain where it was, wholly unaffected by the judgment here; and so will the possible conflict—in the event the Lake is held non-navigable—between the claim of the United States to *all* the presently submerged lands and minerals of the Lake and the claims of the private landowners to portions of the lakebed and appurtenant resources opposite their exposed lands. It was these matters—and these alone—that seemed to require the joinder of the private landowners when Utah was free to advance their claims against the title of the United States. Those issues having passed out of the case, the would-be intervenors, we submit, are neither indispensable nor necessary parties to this action. See Rule 19, F.R. Civ. P.[14]

It follows that none of the littoral landowners (including Morton) may intervene of right—especially in light of the Special Master's conclusion (Report, p. 45) that their limited interest will be adequately represented by the United States. See Rule 24(a), F.R. Civ. P. The only remaining question is whether, as a matter of discretion, Morton and any other similarly situated applicant, ought to be permitted to in-

[14] The would-be intervenors, of course, cannot properly invoke the provision of Rule 19(a) characterizing as a necessary party one whose claimed interest, if left unadjudicated, would "leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." That provision was included for the benefit of the existing party exposed to possible double liability—here Utah—and presumably may be waived.

tervene because their claims include questions of law or fact common to the main action, *i.e.*, the questions whether the Lake is navigable and whether the common law doctrine of reliction applies to the gradually exposed lands below the meander line. See Rule 24(b), F.R. Civ. P.

1. Insofar as the applicants for intervention are attempting to assert claims against the United States which Utah itself is not invoking, the complaints are presumably impermissible as unconsented suits against the sovereign. It may seem an anomaly that we said otherwise when we understood Utah to be putting the United States to the proof of its title against all—as it was entitled to do. But there is no contradiction. We believe Congress consented to a suit in which Utah might require us to establish ownership and might challenge our title by setting up its own superior title or that of third person. If Utah stood on the title of Morton in resisting payment to the United States, it is reasonable to suppose the statute which permitted that was also meant to permit Morton to come in and speak for itself. But the waiver of sovereign immunity goes only to such issues, if any, as Utah chooses to bring into court. And, just as Morton could not initiate this action under Public Law 89–441 had Utah chosen to pay without litigation, so, now, we submit Morton cannot litigate issues which Utah has chosen to remove from this lawsuit.

2. The other aspect of Morton's proposed intervention is presumably its interest to support the position of the United States that the Lake is non-

navigable, and, failing on that issue, that the exposed acreage below the meander line inured to upland owners. If this were a different lawsuit in another court, intervention for this limited purpose might be appropriate. In the prevailing circumstances, however, we suggest it is not.

We note, first, that Morton is only one of some 120 similarly situated landowners. If Morton were permitted to intervene, even-handed dealing obviously would forbid excluding the other patentees, if they wished to participate. Unless it is necessary, the joinder of so many parties is of course undesirable.

Moreover, the application of a single Utah citizen landowner would present an issue as to the original jurisdiction of this Court. That is, of course, a constitutional question which ought not be unnecessarily pressed. While we believe the Court's jurisdiction would not be ousted (see Appendix, *infra*, pp. 23–27), we must acknowledge the difficulty of the issue, especially in light of the Special Master's conclusion at odds with ours (Report, p. 31).

Finally, it is relevant that the case is pending in this Court. While the Federal Rules of Civil Procedure apply here in principle (see Rule 9(2) of the Rules of the Court), the original jurisdiction of this Court is used sparingly and, of necessity, this Court cannot be as hospitable to all claims as the district courts. Cf. *Georgia* v. *Pennsylvania*, 324 U.S. 439, 464. We suggest that the Court's discretion might appropriately be exercised to confine the present action to the original parties.

CONCLUSION

For the reasons stated, the Stipulation of March 1968, entered into between the United States and the State of Utah, should be permitted to be filed and the Motions to Intervene submitted by Morton International, Inc. and Great Salt Lake Minerals and Chemicals Corporation should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Deputy Solicitor General.
DAVID R. WARNER,
MARTIN GREEN,
Attorneys.

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APPENDIX

I

THE JOINDER TO THIS ACTION OF CITIZENS OF UTAH AS PARTIES DEFENDANT WOULD NOT DIVEST THIS COURT OF ITS JURISDICTION OVER THE CASE

In its present posture, this case is one initiated by the State of Utah against the United States as sole defendant. The United States having waived its sovereign immunity, no one contests that such an action is within the original jurisdiction of this Court. It is suggested, however, that the joinder of citizens of Utah as additional defendants would oust the Court's jurisdiction. We think not.

The question is ultimately ruled by the first two paragraphs of Section 2 of Article III of the Constitution, which provide as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Excerpting what seems relevant here, we find that "[t]he judicial Power shall extend * * * to Controversies to which the United States shall be a Party," and that in "all Cases * * in which a State shall be Party, the supreme Court shall have original Jurisdiction." Reading "all cases" to mean "all cases before mentioned," we immediately reach the conclusion that the present action is within the Court's original jurisdiction.

It is not apparent how that jurisdiction can be defeated by the joinder of other parties. Certainly, Article III does not restrict federal jurisdiction premised on the presence of the United States as "a party" to the situation in which it is sole plaintiff or sole defendant. See, *e.g.*, 28 U.S.C. 1347. Nor does the Court's original jurisdiction of such an action depend upon the State's being the only party on the other side. See *e.g.*, *United States* v. *West Virginia*, 295 U.S. 463, 470–471.

What, then, is the obstacle? Is there some overriding principle, albeit not expressed in Article III, that no federal court, or at least this Court, can ever entertain a case, otherwise within its jurisdiction, because the contest is in part between a State and its own citizens? Plainly, the judicial power of the United States is not defeated on that account. To be sure, it has been settled since *Hans* v. *Louisiana*, 134 U.S. 1, that a citizen could not sue his State in the

federal courts without its consent. But that is because of the principle of sovereign immunity, reflected in the Eleventh Amendment. Indeed, such a suit on a federal claim is within the jurisdiction of the United States courts if the State has consented. See *Parden* v. *Terminal R. Co.*, 377 U.S. 184, 186, and cases cited. And while a State rarely chooses the federal forum to sue her own citizens, the removal cases demonstrate that there is no bar to such an action in the United States courts if a federal question is presented. *E.g.*, *Georgia* v. *Rachel*, 384 U.S. 780.

Plainly, the judicial power of the United States extends to a suit, otherwise within federal jurisdiction, in which a State and its citizens are opponents. Given that starting point, it would be difficult to rationalize a rule that absolutely prohibited this Court, unlike other courts, to entertain such an action originally, although the case was otherwise within its original jurisdiction. We submit no such rule prevails.

To be sure, it has been held that this Court cannot entertain an original action presenting only local law issues brought by a State against some of its own citizens and citizens of another State. See *California* v. *Southern Pacific Co.*, 157 U.S. 229, 257, 258, 261; *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 246–247; *Louisiana* v. *Cummins*, 314 U.S. 577. But that is presumably because such a case is beyond the jurisdiction of *any* federal court, on the view that the provision of Article III extending the judicial power of the United States to controversies "between a State and Citizens of another State," like the next clause, requires complete diversity. Cf. *Strawbridge* v. *Curtiss*, 3 Cranch 267.

There remains a troublesome *dictum* in *Southern Pacific*, *supra*, 157 U.S. at 261, and the uncritical alternative holdings in *New Mexico* v. *Lane*, 243 U.S.

52, 58, and *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 163–165.

Southern Pacific was an original action brought by the State of California in this Court to establish its title to certain lands below the line of ordinary high tide of San Francisco Bay, claimed by the Southern Pacific Company under a grant from the City of Oakland. Having determined that the City of Oakland and the Oakland Water Front Company were indispensable parties to the litigation, the Court concluded it did not have original jurisdiction of the case because it was one between the State of California on the one hand and the citizen of another State and citizens of California on the other. Insofar as that holding merely reflects the "total diversity" principle to which we have previously adverted, the ruling is wholly irrelevant here. But, although it appears no federal question was presented, the Court went on to observe (*id.* at 261–262):

> * * * we are not called on to consider * * * whether any Federal question is involved, since the original jurisdiction of this court in cases between a State and citizens of another State rests upon the character of the parties and not at all upon the nature of the case.
>
> If, by virtue, of the *subject-matter, a case* comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States.
>
> It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court, *Marbury* v. *Madison*, 1 Cranch, 137, 173, 174, and no attempt to do so

> is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jursdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction. [Emphasis supplied.]

Although we do not understand the rationale of the opinion, this ruling seems to have been followed uncritically in support of alternative holdings in *New Mexico* v. *Lane,* 243 U.S. 52, 58, and *Texas* v. *Inter-State Commerce Commission,* 258 U.S. 158, 163. At all events, however, there is no reason to apply that rule in this case. Even accepting, which we do not, the proposition that the Court's original jurisdiction of a *federal question case* to which a State is a party is defeated by joinder of citizens of that State as adverse parties, that rule need not be extended to govern this case. Indeed, here, an independent ground of federal jurisdiction is the presence of the United States as a party, and nothing in any decision suggests that the Court may not entertain such a case when a State is a party merely because citizens of that State are parties on the other side. On the contrary, the rationale of *United States* v. *Texas,* 143 U.S. 621, would oppose that result. And see *Oklahoma* v. *Texas,* 258 U.S. 574.

II

NEITHER THE ELEVENTH AMENDMENT NOR THE DOCTRINE OF SOVEREIGN IMMUNITY BARS THE ASSERTION OF PRIVATE CLAIMS TO LANDS WITH RESPECT TO WHICH THE STATE IS SEEKING TO QUIET ITS OWN TITLE

The Eleventh Amendment prevents any federal court from entertaining an unconsented suit against a State by citizens of another State, even on a federal claim *Louisiana* v. *Jumel,* 107 U.S. 711. And like principles of sovereign immunity insulate a State from being compelled to answer a suit brought by its own citizens in federal court. *Hans* v. *Louisiana,* 134 U.S. 1. On the other hand, if the State has consented, the federal courts are competent to adjudicate a claim, otherwise within federal jurisdiction, filed against the State by its own citizens or citizens of another State. See *Parden* v. *Terminal Co.,* 377 U.S. 184, 186, and cases cited. Accordingly, the question on this branch of the case is whether Utah may fairly be deemed to have waived its sovereign immunity so as to permit a suit against it by private citizens with respect to the lands claimed by it in the present suit.

In our view, the State's action in asserting title to the disputed lands and submitting that question for adjudication constitutes consent to the determination of any adverse claim with respect to the same *res.* It is elementary that he who asks judgment in his favor submits himself to the risk of an adjudication in favor of his opponent. Even sovereigns are not exempt from this principle. See *United States* v. *The Thekla,* 266 U.S. 328, 339–340. To be sure, a suit to collect a money judgment does not waive sovereign immunity with respect to a counterclaim for a greater sum. *United States* v. *Shaw,* 309 U.S. 495. But when

a sovereign invokes the aid of the courts to settle its claim to a certain asset, it must be taken to have consented that opposing claims to the same asset should be entertained. *Clark* v. *Barnard,* 108 U.S. 436, 447–448. That is obvious in the case of the named defendant. *E.g., United States* v. *Louisiana,* 363 U.S. 1, 84. Nor is it apparent why the principle does not apply to intervening claimants, especially if they are indispensable parties. Cf. *Gunter* v. *Atlantic Coast Line,* 200 U.S. 273.

In sum, we believe neither the Eleventh Amendment nor any rule of sovereign immunity prevents the Court from entertaining the claims of Morton International or other private parties insofar as they assert ownership to the lands which Utah has chosen to place in litigation by praying that its own title thereto be quieted. We accordingly conclude that all of the private claimants should be allowed to intervene to assert their title as against the State with respect to the acreage also claimed by both Utah and the United States. On the other hand, we note that the Court need not resolve disputes between the State and private claimants *with respect to lands disclaimed by the United States* in order to fulfill the objective of the Great Salt Lake Lands Act. Indeed, the Act authorizes the present suit only to determine the extent of the *federal* lands in the area so as to fix the amount due the United States by Utah upon their transfer to the State. For that purpose, it is unnecessary to settle the State's title to lands which are adversely claimed by other persons, but not by the United States. And the United States is of course a disinterested bystander with respect to that controversy.

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In the Supreme Court of the United States

October Term, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

BRIEF OF THE STATE OF UTAH IN SUPPORT OF THE NAVIGABILITY OF THE GREAT SALT LAKE

COUNSEL FOR PLAINTIFF:

VERNON B. ROMNEY
Utah Attorney General

ROBERT B. HANSEN
Deputy Utah Attorney General

DALLIN W. JENSEN
Assistant Attorney General

RICHARD L. DEWSNUP
Special Assistant Attorney General

CLIFFORD L. ASHTON
Special Assistant Attorney General

EDWARD W. CLYDE
Special Assistant Attorney General

236 State Capitol Building
Salt Lake City, Utah 84114

August 1, 1969

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I. MEMORANDUM

A. Preliminary Statement

The procedural history of the instant litigation is clearly reflected from the record of prior proceedings, and there seems to be little point in again detailing those procedures and events. Therefore, in this memorandum Utah will simply make a brief statement with respect to the issue of navigation, and will then discuss the applicable legal test of navigability.

The essential purpose of this litigation is to determine the respective claims of ownership asserted by Utah and the United States to lands surrounding the

Great Salt Lake which previously constituted a part of the bed of the lake but which are now exposed because of the lower water level of the lake. As such, the basic issue for determination is whether the common law doctrine of reliction should be applied to permit the United States to acquire title from Utah to certain of the exposed lands. The question of navigability of the Great Salt Lake is thus not the basic issue in the litigation, but it is a necessary preliminary issue.

The reason it is a necessary preliminary issue is because Utah is the plaintiff in this litigation and claims that, prior to the quit claim conveyance by the United States to Utah, Utah had a title superior to that of the United States in and to the exposed lands. If so, Utah received no title from the United States as a result of the conveyance and is obligated to pay nothing to the United States for such conveyance. Thus, as plaintiff, Utah has the burden of proving a *prima facie* case showing that it acquired prior title to the bed of the Great Salt Lake at statehood because it was a navigable body of water; it will then be incumbent upon the United States to prove its claim that the doctrine of reliction somehow divested Utah of its ownership of certain parts of the exposed lands that once constituted part of the lake bed. Utah's claim of title is based on the equal footing doctrine, which, so far as applicable here, holds that the United States Constitution guarantees to each state, upon its admission to the union and pursuant to its enabling act, equal sovereign rights and equal footing with every other state in the union, including ownership of the beds of all navigable lakes and rivers located within such state.

Martin v. Wadell, 41 U.S. (16 Pet.) 367 (1842); *Pollard v. Hagan,* 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlbey,* 152 U. S. 1 (1894); *United States v. Holt State Bank,* 270 U. S. 49 (1926); and *United States v. Utah,* 283 U.S. 64 (1931).

The United States does not deny the validity of the above doctrine, but has denied the allegations of Utah's complaint, including the allegation of the navigability of the Great Salt Lake on January 4, 1896, which was the date that Utah obtained statehood. In view of that denial, it was necessary for Utah to prove that the lake was navigable at the date of statehood. To simplify the proceedings, it was agreed by counsel for Utah and the United States, and approved by the Special Master, that a preliminary hearing should first be held on the issue of navigability only. If the lake should be determined to be navigable, then a second hearing would be held to determine the applicability of the doctrine of reliction. The hearing on navigability was held May 19 through 21, 1969, in Salt Lake City, Utah. Thus, the only question presently under consideration is the navigability of the lake, and all other questions pertinent to the litigation are to be reserved for subsequent consideration and determination.[1]

---

1 In this regard, Utah raised certain issues at the hearing concerning the propriety of taking judicial notice that the lake was navigable at statehood, the applicability of the doctrine of equitable estoppel against the United States, and compromise and settlement between the United States Congress and the Utah Legislature. Utah further expressed the position that the only possible ramifications of a determination of navigability related to ownership of the exposed lands, and not to ownership of the water covered bed or minerals in solution in the lake waters (see, generally, T. 6-11). Since these issues and contentions appear to be moot if the lake is found to be navigable, they are not further raised or argued in this brief. If, for some reason, the lake should be found to be non-navigable, Utah then will determine when and to what extent it wishes to press such arguments.

Utah believes that it is obvious that the Great Salt Lake was navigable at statehood, that the record contains uncontroverted evidence which more than satisfies the federal test of navigability, that a finding of navigability can be made with reasonable dispatch, and that the litigation can properly proceed to a determination of the questions relating to reliction. With that background, it would appear to be appropriate to proceed to examine the legal test of navigability as laid down by the United States Supreme Court.

B. FEDERAL TEST OF NAVIGABILITY

The federal test of navigability, for the purpose of determining whether a state obtained title to the bed of a body of water at statehood, is whether the river or lake in its natural and ordinary condition was physically capable of supporting commercial navigation, and thus serving as a useful highway of commerce. This test was laid down by the United States Supreme Court in 1879, and has been followed consistently in all subsequent cases.

Perhaps the leading case applying the federal test of navigability is *United States v. Utah*, 283 U. S. 64 (1931), which involved a determination of the navigability of certain portions of the Colorado, Green and San Juan Rivers in Utah, where the sections of the rivers in question contained many impediments to navigation and were only about three feet deep during major portions of the year. Counsel for the United States stressed the absence of historical data showing the early navigation of the rivers by Indians, fur traders or early explorers; that is, uses of the sort

sometimes earlier mentioned by the Court in considering the navigability of certain other streams. The Government had argued (see pages 66-67) that evidence of such lack of use in difficult days of overland travel was weighty evidence of non-navigability, and that no lake or stream had been declared navigable by the Supreme Court unless it had appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce.

The Court laid to rest the Government's attempt to read into the navigability test a requirement of actual substantial navigation, and at the same time reaffirmed the principles laid down by several earlier cases, with the following language (at page 82-83):

> "The question of the susceptibility (to use as highways of commerce) in the ordinary condition of the rivers, rather than the mere manner or extent of such use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved . . . In Economy Power & Light Co. v. U. S., 256 U.S. 113, 122, 123, the Court quoted with approval the statement in the *Montello, supra*, that the 'capability of use by the public for purposes of transportation and com-

> merce affords the true criterion of the navigability of a river, rather than the extent and manner of such use.' "

The Government further attempted to argue that this line of reasoning required a consideration of probable future commerce, but that consideration was too speculative to be entertained by the Court. It was held that the State did not need to prove the probable need for future navigation, because there was always the possibility that such a future need could arise and (at page 83):

> "the possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such rivers as were navigable in fact at the time of the admission of the the State either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And that capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put."

Having failed in its attempt to read into the test of navigability a requirement of actual substantial use, the Government was forced to fall back on an attempt to dispute navigability of the rivers by establishing that

they contained impediments to navigation such as logs and debris, ice, floods, rapids, rapid velocities with sudden changes in the water level, shallow depths, instability of channel, and sand and sediment which combined with the tortuous course of the rivers to produce a succession of shifting sandbars. The Court conceded the presence of all of these impediments and entered into an extensive discussion (at pages 85-87) of the evidence regarding types and frequencies of the sandbars, which it felt to be the principal impediment to navigation. Nevertheless, the Court held that the fact of impediments was not equivalent to the fact of non-navigable capacity (at page 86):

> "Recognizing the difficulties which are thus created, the Master is plainly right in his conclusion the mere fact of the presence of such sandbars causing impediments to navigation does not make a river non-navigable. It is sufficient to refer to the well-known conditions on the Missouri River and the Mississippi River. The presence of sandbars must be taken in connection with other factors making for navigability. In The Montello, supra, the Court said (p. 443): Indeed, there are but few of our . . . rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases like the Fox River, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers such as rapids and sandbars."

The test of navigability thus applied in *United States v. Utah, supra,* was simply a re-affirmation of the same principles originally set forth by the Court in *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563-64 (1870), which involved a determination of the navigability of the Grand River in Michigan for purposes of application of a federal licensing statute. The Court, after noting that the doctrine of the common law as to the navigability of waters (i.e., that the ebb and flow of the tide constituted the usual test of navigability) had no application in this country, stated:

> "A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . .
>
> From the conceded facts . . . the (Grand River) is capable of bearing a steamer of one hundred and twenty three tons burden, laden with merchandise and passengers . . . a distance of forty miles.

The Court's opinion indicated that the crux of the test of navigability was not whether the Grand River was actually being traversed by commercial navigation, whether of minute or substantial extent, but rather whether the stream had a capacity to sustain such commercial navigation, and whether it was susceptible of being used as a highway for commerce. Since the appel-

lant had conceded that the stream was capable of bearing a steamer of one hundred and twenty-three tons burden for a distance of forty miles, laden with merchandise and passengers, the Court reached the obvious conclusion that the Grand River did have a capacity to bear commercial navigation.

The navigability test laid down by *The Daniel Ball* was subsequently relied upon by the Supreme Court in *The Montello,* 20 Wall. 430 (1874). The Court there applied the test to the Fox River in Wisconsin, a stream which in its natural state was interrupted in various places by rapids and falls, and yet determined it to be navigable. The Court's opinion again emphasized that the crux of the test is the capability of use for navigation rather than the existence, extent, or manner of such use. The Court stated (at page 441):

> "(T)he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending the navigation . . .
>
> It would be a narrow rule to hold that . . . unless a river was capable of being navigated by steam or sail vessels it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact . . ."

This test of navigability thus established by *The Daniel Ball* and followed by *The Montello,* that a body

of water is navigable in law if it is navigable in fact, has been subsequently followed and reaffirmed without any significant modification on numerous occasions, and a persuasive line of reasoning and authority has been developed. See, *e.g.*, *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 699 (1898); *United States v. Cress*, 243 U. S. 316, 323-24 (1917); *Economy Light and Power Co. v. United States*, 256 U. S. 113, 118 (1921); and *Oklahoma v. Texas*, 258 U. S. 574, 586 (1921).

In *Oklahoma v. Texas, supra*, the Court (at page 586) noted it to be a:

> "settled rule in this country that navigability in fact is the text of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (citing the *Daniel Ball*, The *Montello*, *United States v. Rio Grande Irrigation Co.*, *United States v. Cress*, and *Economy Power & Light Co. v. United States*).

The Court concluded (at page 591) that the portion of the Red River there in issue was non-navigable because:

> "trade and travel neither do nor can move over that part of the river, in its natural and ordinary condition, according to the modes of trade and travel customary on water; — in other words, that it is neither used, nor susceptible of being used, in its natural and ordinary condition as a

> highway for commerce. Its characteristics are such that its use for transportation has been and must be exceptional, and confined to the irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability."

The opinion indicates that, once again, the Court's concern was that the river lacked a capacity to be used regularly in commerce to at least some extent, rather than whether commercial activity had been absent, minimal, or substantial.

The next important case to deal with the question of navigability was *United States v. Holt State Bank*, 270 U. S. 49 (1926). It was the first significant case to apply the test of navigability to a lake, and involved a bill in equity brought by the United States to quiet title to the bed of Mud Lake in Minnesota, which had been substantially drained at the time of suit. The outcome of the case turned on the navigability of Mud Lake. The test applied by the Court was the one evolved from the earlier line of cases cited above, and set forth (at page 56) as follows:

> "The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further, that navigability does not depend on the particular

> mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

This test was applied to evidence which the Court felt established, among others, the following facts:

> "In its natural and ordinary condition the lake was three to six feet deep . . . Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose . . . . Merchants in the settlements at Liner and Grygla, which were several miles up Mud River from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided by keeping the boats in the deeper parts or channels . . . Gasoline motor boats were used in surveying and marking the line of the intended ditch through the lake and the ditch was excavated with floating dredges."

The Court concluded that the evidence required a finding that Mud Lake was navigable, pointing out that the lake was susceptible of being used as a highway for trade and travel if there had been a need for trade and travel on the lake.

It will thus be observed that at all times during the last century the United States Supreme Court has consistently applied the same test of navigability that was adhered to and emphasized in *United States v. Utah, supra,* which is the most recent case of significance on the subject, and where the Court found water three feet deep sufficient to support navigation (only about 10% as deep as the 30 foot depth of the Great Salt Lake).

C. CONCLUSION

1. *General*

To satisfy fully the test of navigability as laid down and consistently followed by the United States Supreme Court over the 100 years last past, Utah need merely show that the Great Salt Lake was susceptible of commercial navigation on January 4, 1896, the date at which Utah obtained statehood. It is believed that the uncontroverted exhibits showing the lake at statehood to have had a depth of 30 feet, a length of more than 75 miles, and a width of more than 30 miles, clearly show such susceptibility. Further, it appears that the United States does not deny this susceptibility, since counsel for the United States explained during the hearing that the "Queen Mary" and other "boats which can cross the Atlantic could float in the Great Salt Lake and maybe go—travel in the middle of the lake to some degree up and down the channel" (T. 19), and "almost any boat in the world, so far as I know, could be used on the Great Salt Lake" (T. 280). The position of the United States was that there was no com-

mercial reason or need to utilize the capability of the lake for commercial navigation (T. 19).

As shown above, the United States Supreme Court has clearly and consistently rejected arguments claiming that either a commercial use or a commercial need must be shown. The Court has made clear that a showing of susceptibility is enough to vest title in the state, because future possibilities of use or need are too remote and speculative to be foreseen with any certainty, and they cannot be discounted. When and if the need should arise, the body of water physically capable of supporting navigation will be there to fill the need.

Even so, Utah believes that the record demonstrates that the Great Salt Lake was used for commercial navigation prior to statehood, at the time of statehood, and at the present time. So, while Utah rejects any argument that either a commercial use or a commercial need must be shown, if such a novel standard should be adopted, the evidence in the record clearly and unequivocally would satisfy that standard.

2. *Method of Reference*

Turning now to a different matter, it is believed that some explanation will be helpful to the Court with respect to the organization of the remaining contents of this brief. Preceding the proposed Findings of Fact and Conclusions of Law, there is a section entitled Summary of Evidence, which contains a brief resume' of the testimony of the witnesses, an identification of the exhibits introduced, and a review of the physical

characteristics of the Great Salt Lake. This summary is intended to serve as a review of the evidence prior to presenting the proposed Findings and Conclusions. The proposed Findings of Fact further contain direct citations to the record, but the Summary of Evidence will afford a preliminary and somewhat explanatory reference for every citation to testimony or exhibits referred to in the Findings of Fact.

The exhibits are identified by the same designation and in the same manner as they were introduced; the two volume transcript of the testimony of witnesses and other proceedings in open court is simply cited by the letter "T", followed by the appropriate page number. Each witness is listed in the table of contents at the beginning of the brief, along with the page at which his testimony is summarized, so that the testimony of any witness may be readily reviewed. Further, each exhibit as listed in the Summary of Exhibits on pages 33-41 of this brief contains a citation to that part of the transcript where the particular exhibit was first discussed or introduced.

It is hoped that this system of reference will expedite use of the transcript in (1) reviewing the testimony of witnesses and (2) obtaining foundation and explanatory information relating to the exhibits.

II. SUMMARY OF EVIDENCE

A. SUMMARY OF TESTIMONY

1. *Zillah Walker Manning*, called as a witness for plaintiff, testified that:

   a. She was born in 1891, five years before statehood, in Farmington, Utah, just east of Great

Salt Lake (T. 217); her family lived on Antelope Island at the time of her birth, and she lived on Antelope Island until she was 12 years old, during which time her father was superintendent of livestock on the island (T. 217-18).

b. While on the island (until over 12 years of age) she remembered livestock always moved to and from the island and mainland "on a flat bottom boat" (T. 219); and that her family would get their supplies from Farmington by boat (T. 220). She identified herself on a picture taken on the island and marked as Exhibit P-39, and admitted into evidence as Page 32-A of Exhibit P-8, taken when she was 11 years old (1902) T. 220); she also identified a picture of a boat that would frequently carry about 40 head of cattle and buffalo, and was powered by sail from the island to Farmington and back (T. 221-22, Exhibit P-8, page 32-A).

c. She remembered that a harvester, requiring 12 horses to pull it, was taken to the island by boat (T. 222); and that grain raised on the island was shipped by boat, "lots of times", about twice a week in the summertime and once a month in the winter (T. 223).

d. She remembered when her father went by boat to Salt Lake City and stayed two extra days to celebrate Utah's statehood, and he brought her a chrysanthemum, which she still has (T. 223-24).

e. She knew a Mr. George Frarey, who made his living with a boat by taking people around the lake, from Antelope Island (T. 225).

f. On cross-examination, she explained that White and Sons owned the cattle boat used by her father (T. 227); and that a Mr. Backman owned a boat which he used to ship others ranchers' sheep from Wenner's Island (Fremont Island) to

Syracuse (T. 228) in Davis County (Exhibit P-1).

2. *Leon L. Imlay,* called as a witness for plaintiff, testified that:

a. He was born in 1893, three years prior to statehood, at Grantsville, Utah, near the southern shore of the Great Salt Lake (T. 61) and lived there until 1939 (T. 66).

b. His first recollection of visiting the Great Salt Lake was in 1898, when he was nearly five years of age, at which time he went to Garfield Beach with his parents, where he rode as a passenger on an excursion boat similar to the one pictured at page 10 of Exhibit P-8 (T. 62-63). He was able to fix the exact year of that first visit because his mother was pregnant with a child which was delivered August 15, 1898, which was shortly after the boat trip (T. 64). He also recalled that at that early age he had his hair in long ringlets, and had a vivid recollection of some passengers referring to him as a "beautiful young lady" (T. 65).

c. Many times thereafter he went to the Garfield Beach for similar boat excursion rides (T. 63).

d. He first visited Saltair Resort when he was about 15 years of age (12 years after statehood) (T. 68), and remembered Saltair Beach as pictured on page 13 of Exhibit P-8 and Saltair Resort as pictured on page 14 of Exhibit P-8 (T. 67-68). During that first visit to Saltair, he observed "many" boats, representing "everything you could think of," and including sailboats, rowboats and powerboats (T. 68).

e. He lived at Grantsville for approximately 46 years (1893-1939) and during that time made frequent trips to Salt Lake City, traveling on

a road that passed within 300 yards of the Great Salt Lake; during these trips he saw many sailboats, rowboats and power driven boats of various sizes on the Great Salt Lake; he observed these boats as far out on the Lake as the center; and he often counted the boats that could be seen, and sometimes he counted more than 50 boats, which were operating out of Garfield Beach (T. 66-67).

f. Beginning in 1928, as an employee of the Royal Crystal Salt Company, he was assigned the responsibility of operating the pump station owned by that company and located near Saltair Resort, and used to pump lake brines to evaporation ponds for production of commercial salt; he was in charge of the pump station for about 11 years, or until 1939; during this period he visited the pump station one or two days each week, the pump station being located in water about 8 feet deep; during these visits he would see a number of boats, ranging in size from "tiny" boats to large power boats; and, in fact, he and his crew always had to use boats to operate the pump station, carrying crewmen, gasoline for the pump, fresh water and general supplies (T. 68-69, 73).

g. He also visited Gunnison Island "with Charles Stoddard on his sheep barge," and "observed where there had been operation of moving guano from the island for fertilizer," and the only way to transport guano from the island was by boat (T. 70-71).

3. *Joseph S. Nelson*, called as a witness for plaintiff, testified that:

a. He is a lawyer, was born in 1897 (one year after statehood), and began working at the Saltair Resort when ten years of age because his father

was president and manager of the resort; and he remembered Saltair as pictured at pages 13 and 14 of Exhibit P-8 (T. 83-84).

b. He said Saltair had a regular boat harbor and a beach (T. 89); that part of his job was to collect fees for the rental of boats on the lake; that Saltair Beach operated a commercial excursion boat called the "Alice Ann," named after his sister (T. 85); he remembered "many" other commercial boats for hire, including the "Vista" and the "Irene" (T. 87-89); and said Saltair entertained as many as 10,000 bathers a day and 4,000 dancers at night (T. 87).

c. He remembered a boat harbor at Sunset Beach (T. 92) and a boat harbor at Garfield Beach owned by Salt Lake County, identifying Exhibit P-11 as a picture of one part of that harbor and showing his brother's boathouse; he thought the picture was taken during the 1930's (T. 91-92).

d. He remembered livestock barging operations on the lake, including a boat named the "Ruth" owned by John Dooley "that was a commercial boat used for hauling cattle back and forth from the place they were raised and taken off Antelope Island"; and that the owners of the livestock arranged to transport "their cattle and sheep in boats, big barges to Saltair" (T. 85-86), and that the barges would each hold over 50 head of cattle (T. 89); that the livestock were shipped from Antelope Island to a railhead at Saltair, where they were unloaded from the barges into chutes and then shipped by rail (T. 85-86); and that he observed this livestock barging operation each year between 1914 and 1920 (T. 93-94).

e. On cross-examination, he explained that the "Ruth" was actually in the nature of a tug boat

used to tow livestock barges (T. 96); that he knew of other livestock barging operations from Antelope Island to a Davis County boat dock, but wasn't familiar with the details (T. 97); that the boats used for rental and commercial excursions held from two passengers to fifty or more (T. 94-95); and that Southern Pacific owned a big 50 horsepower boat called the "E. W. Marsh" which was used to patrol the Lucin Cutoff trestle (T. 96).

4. *Claire Wilcox Noall,* called as a witness for plaintiff, testified that:

a. She was born in 1892, 4 years prior to statehood, in Salt Lake City, Utah; received a B.A. Degree from the University of Utah and completed the M.A. Degree requirements in creative writing; and has done considerable historical work and had experience as a photographer (T. 75).

b. She was a neighbor of Captain Davis, and had "several boating experiences" with him on the Great Salt Lake (T. 75); and she specifically remembered taking overnight excursions on the "Cambria," owned by Captain Davis, between the years of 1904 and 1906, when the Lucin Cutoff trestle was being constructed (T. 76); on the overnight excursions 20 to 24 people were on the boat, and 20 to 30 people were on the boat during daily excursions (T. 77); and after Captain Davis discontinued operating boats, his son took commercial excursions on the Great Salt Lake (T. 78).

c. Before she was 8 years of age she went to Saltair, and remembered it "exactly" as shown on pages 12 and 14 of Exhibit P-8, and remembered seeing boats at Saltair (T. 78-79).

5. *Francis W. Kirkham,* called as a witness for plaintiff, testified that:

   a. He was born in 1877, nine years before Utah's statehood; was familiar with the boating activities at Garfield Beach before statehood; was a paying passenger on the excursion boat pictured on page 12 of Exhibit P-8; and the first such trip that he took was before 1896 (T. 233-35).

   b. Dr. Kirkham's educational background included an A.B. Degree from the University of Michigan, an LL.B. Degree from the University of Utah, and a Ph.D. from the University of California at Berkeley (T. 233).

6. *Phil Dern,* called as a witness for plaintiff, testified that:

   a. He is 49 years of age; his father operated Sunset Beach from 1934 until his death in 1957, and prior to 1934 had operated Black Rock Beach; and since 1957 he (Phil Dern) has operated Sunset Beach (T. 111).

   b. Every year from 1934 to the present time Sunset Beach has operated boats for hire, usually on a concession basis whereby Sunset Beach receives a percentage of the gross income from boat rides and rentals, which percentage now approximates $10,000.00 per year (T. 112); the average boat would carry 12 to 15 passengers, although the present concessionaire (John Silver) also uses several larger amphibious "army ducks" (T. 113).

   c. He operated a 28 foot Chris-Craft for about 5 years after World War II; Donald Newhouse, a concessionaire, operated a 42 foot twin engine diesel which carried about 35 commercial passengers and operated on a full time basis from the middle of May to the end of September of

each year (T. 113-14); and his present boat rides are typically from 20 to 30 minutes to accommodate the time schedule of Greyline Motor Tours passengers, although other passengers can, and do, take excursions anyplace on the lake (T. 116, 121).

d. He now has been awarded a contract by the Utah Park and Recreation Commission to operate boats on Antelope Island State Park at the north end of Antelope Island; and this will require the installation of a floating dock and related boating facilities, the sale of gas and oil to boaters, and boat rides for hire (T. 114-15, 119).

e. He personally observed commercial shipment of guano from Bird Island by a company which used a 50 to 60 foot LCI landing craft, loading the guano with a tractor with a front end loader, and shipping it approximately 25 to 30 miles from Bird Island to the Salt Lake County Boat Harbor; the guano company operated on a regular basis each year from about 1947 to 1955, a period of "eight or nine years" (T. 116-17, 123-24).

7. *John Clawson Silver,* called as a witness for plaintiff, testified that:

a. Since 1963 he has operated the Silver Sands Beach on the Great Salt Lake for commercial boat rides, and during that time his income from boat passengers has increased from $8,000.00 to $30,000.00 per year (T. 287-88).

b. He operates eight "army ducks" and a launch, with each boat carrying 30 to 35 paying customers per trip; he has operated a 36 foot Chris-Craft on the lake for 13 years for business promotional purposes; and he is now considering purchasing a boat 100 to 200 feet long for commercial passenger service (T. 289-91).

c. He has operated several barges to ship salt crystals and rock from Antelope Island and Stansbury Island to the mainland; these products were not offered for sale but were used for decorative purposes in his commercial appliance store (T. 289).

8. *Reese F. Llewellyn,* called as a witness for plaintiff, testified that:

a. He is a claims agent and special agent of D & RG Railroad; a member of the Utah State Bar, and previously worked for Salt Lake County Sheriff's office from 1935 to 1943 (T. 103).

b. His duties as a deputy sheriff took him to Sunset Beach and Black Rock Beach and he identified Exhibit P-11 as part of the Salt Lake County Boat Harbor, built as "a big 'T' shaped boat harbor" (T. 104).

c. The Salt Lake County Sheriff operated a tug-like boat, 25 to 30 feet long, with a cabin and powered by a diesel motor under the deck which was used for law enforcement patrol and rescue, operating continuously during summer months, over substantial areas of the Lake (T. 105-06).

d. He frequently observed between 40 and 50 boats moored at the Salt Lake County Boat Harbor, and as many as 75 to 100 additional boats out on the lake. Also, other excursion and rental boats were at Sunset and Black Rock Beaches. These observations were made while he was serving on the lake as a deputy sheriff from 1935 to 1943 (T. 106-07).

9. *Harold J. Tippetts,* called as a witness for plaintiff, testified that:

a. He is employed by the Division of Parks and Recreation of the State of Utah and previously

served as the Director of the Great Salt Lake Authority (T. 129).

b. The Division of Parks and Recreation has created and is developing Antelope Island State Park at the north end of Antelope Island, encompassing 2,000 acres of land; the park is connected to the mainland by a recently constructed causeway fill road 7½ miles in length at a cost to date in excess of $750,000.00 (T. 129-30, 137); a boat ramp is to be constructed at the park and $445,000.00 has been planned for marina facilities (T. 130-31); there will be permanent berths for 200 boats, ranging in size from small canoes to 45 foot craft (T. 135, Exhibit P-16). The major boating travel probably will be from the southern part of the lake to the park, traveling west of Antelope Island, but such travel could cover the major portion of the lake (T. 132); and there will be a boat concessionaire at the park (T. 131-32).

c. Senate Bill 25 is now pending in the U.S. Congress to establish a Great Salt Lake National Monument on Antelope Island (T. 130, Exhibit P-15); the National Park Service estimated that the Utah State Park on Antelope Island would attract 300,000 visitors the first year during the 5 year development period, and would attract in excess of 840,000 visitors per year by the end of such development period (T. 31).

d. The State of Utah, Salt Lake County and Hill Air Force Base own and operate rescue craft on the lake (T. 132).

10. *Thomas T. Lundee*, called as a witness for plaintiff, testified that:

a. He is a consulting engineer and naval architect, licensed by the State of California, and owns his own consulting company with offices in San

Francisco (T. 166-67); he has designed many small barges, large barges, off-shore drill rigs, bulk carriers, tug boats, and dredges (T. 167-68); he has obtained about 15 patents for marine equipment design, including one for the "push-tow" process for large barges designed by him for use on Great Salt Lake (T. 169); and, generally, has designed marine craft for over 30 years, is familiar with barge design, operation and use, and is familiar with navigable waters, including navigable waters of the United States (T. 169).

b. He was engaged by Morrison-Knudson Company and International Engineers to design barges and tug boats for use on Great Salt Lake to construct a rock fill causeway across the lake for Southern Pacific Company (T. 170); he studied the waters of the lake, finding them to contain about 20% more salt than ocean water, thus resulting in a 20% "bonus" in carrying capacity of barges and other craft because the greater buoyancy resulted in a shallower draft (T. 171-72); and he discovered that the heavier salt concentration prevented the water from freezing, thus permitting year round barging operations (T. 172, 177), and that such salt concentration presented no serious problems of corrosion, operation or maintenance (T. 173-74, 177).

c. Thirty nine boats were acquired at a cost of about $7,000,000.00 (T. 176) for use on the Great Salt Lake causeway construction (T. 173); including barges and equipment designed specifically for that particular job (T. 169, 175); and that the boats consisted of:

(1) Six large dump barges 250 feet long, 55 feet wide, and 12 1/3 feet deep, each capable of carrying a per trip tonnage load

equal to 90 railroad cars, with a draft of 13 feet (T. 175-76);

(2) Six 1,000 horsepower tow boats to push the dump barges;

(3) Five deck barges 178 feet long, 48 feet wide, and 10 feet high, with a per trip carrying capacity of 1,600 tons each;

(4) Two 600 horsepower twin-screw tour boats;

(5) Three 220 horsepower tug boats;

(6) Two dredges;

(7) Fifteen miscellaneous boats, including dredge tenders, anchor scows, anchor barges, pile driving barges, crew boats and scows (T. 176, Exhibit P-21).

d. The thirty nine boats were used on the Great Salt Lake for about two years, from early 1957 to 1959 (T. 177), completing a job that cost about $49,000,000.00 and required the removal and placing of 41,000,000 cubic yards (over 70,000,000 tons) of fill, with over 90% of the fill being placed by barges as the only feasible means of hauling and placing such fill (T. 178-79); the tonnage of fill hauled by the barges was "vastly cheaper" than that part of the fill actually hauled by trucks and railroad cars (less than 10%) (T. 179).

e. The Great Salt Lake was particularly economical for navigation, because:

(1) The water did not freeze in winter and the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. -

(2) The harbor, dredged at Little Valley near Promontory Point, was 400 feet wide and

1,500 feet long, and was unusually inexpensive because it was clay with very little rock (T. 181); due to lack of currents and tides in the lake, the harbor did not silt or fill and during the two years of continual use no further dredging, cleaning or maintenance was required (T. 182-84); and, in general, the cost of harbor construction and maintenance on the Great Salt Lake was "appreciably less" than on other inland waterways customarily used for navigation (T. 184).

(3) The greater buoyancy of the waters of the Great Salt Lake made navigation more economical than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171); the dump barges that operated fully loaded on Great Salt Lake with a 13 foot draft would have required a 15½ foot draft on the Mississippi River, and since that river has a 9 foot governing channel, could only have operated there with a partial load (T. 175-76); all barges in commercial use in 1896 when Utah obtained statehood could have successfully navigated on the Great Salt Lake (T. 207-08); and barges in common use today, such as grain barges, cement barges, petroleum barges and all other commercial barges shown in a publication entitled "Commercial Transportation on the Inland Waterways," published by the Society of Naval Architects and Marine Engineers (Exhibit P-22), could operate fully loaded on the Great Salt Lake (T. 206).

f. Additionally, Mr. Lundee stated that:

(1) After completion of the causeway on Great Salt Lake, the barges and other craft were in good condition and were sold at favor-

able prices for use elsewhere in the world (some, loaded with smaller craft, were towed across the Atlantic Ocean for use in Portugal) (T. 173-74).

(2) It would be necessary to use boats to drill for oil or gas underneath the bed of the Great Salt Lake (T. 210).

(3) If the need should arise, the railroad trestle and causeway could be modified at reasonable cost to accommodate larger commercial vessels, probably by constructing draw bridges or swing bridges (T. 206-07).

11. *Golden O. Peterson*, called as a witness for plaintiff, testified that:

a. He is employed by the Southern Pacific Company, owner of the railroad trestle and causeway across Great Salt Lake; he was first assigned to duty on the lake in 1942, and in 1956 was promoted to his present position as Assistant Bridges and Buildings Supervisor (T. 148-49).

b. Since 1956, he has used boats each week on the lake to inspect the trestle for safety; and prior to the construction of the causeway the boat patrol trips to inspect the trestle were made daily (T. 150); the boats now used for inspection and patrol include three 28 foot steel boats with 12 foot beams (Exhibits P-19 and P-20, T. 150-52) and one 25 foot steel boat (T. 153); the trestle is about 12 miles long and a round trip on patrol takes about 5 hours (T. 150-51); the 25 foot boat can go through the trestle and the causeway culverts at all times; but when the lake level is high the 28 foot boats sometimes have trouble with vertical clearance in the causeway culverts, and when the water is low the 28 foot boats sometimes have difficulty with lateral

clearance when passing through the trestle (T. 153-56).

12. *Gail Sanders,* called as a witness for plaintiff, testified that:

a. He is president of the Sanders Brine Shrimp Company; has been engaged in brine shrimp operations on the Great Salt Lake since 1953; and he and his brother are employed on a full time basis by the business (T. 157).

b. Most brine shrimp are harvested near Antelope Island and require the use of boats, both for harvesting and transporting; shrimp eggs are blown to the shore and ordinarily harvested with special equipment on a four wheel drive vehicle (T. 158-59, 163); the shrimp and eggs are sold for tropical fish food, and the eggs are vacuum packed in cans and the shrimp frozen in plastic bags and shipped all over the world (T. 160, 163); eggs usually represent the majority harvest, but conditions vary and this is not always so (T. 163-64); the largest annual harvest of eggs was 200,000 pounds (T. 161) and the largest annual harvest of shrimp was 90,000 pounds (T. 162), and they pay the Utah Division of Fish and Game a royalty of about $5,000.00 per year (T. 160).

c. The company uses three air boats 18 feet long and 6 feet wide (each capable of carrying about 1,200 pounds of adult shrimp) (T. 158-59); other boats have been used in the past, but the air boats are preferable because they can operate in any depth of water (T. 158).

13. *William Paxton Hewitt,* called as a witness for plaintiff, testified that:

a. He is Director of the Utah Geological and Mineralogical Survey (UGMS) and Professor of Geology at the University of Utah (T. 139).

b. The UMGS operates a fleet of five boats on the Great Salt Lake, including three amphibious ducks, a 21 foot motor dory, and a 42 foot steel research vessel with a 13 foot beam (T. 130-40, 145, Exhibits P-14, P-24 and P-25); these boats are used for scientific investigations on the lake, and the only way this can be done is through the use of boats (T. 140); the investigative work includes study of the chemical characteristics of, and variations in, the brines (T. 140), and study of the bottom sediments to determine the required support structures for oil exploration drilling and possible mineral extraction from bed sediments (T. 141); other investigative studies have been performed by private organizations (Exhibit P-17, T. 142) by renting the large UGMS boat for $550.00 per day, by the U. S. Army Corps of Engineers for a national defense mapping program in 1968 (T. 143), and both the Water Resources Division and the Topographic Division of the United States Geological Survey use the UGMS craft for scientific work (T. 146); during 1969 the University of Wisconsin will use the UGMS craft to perform seismic work on the lake, in cooperation with the UGMS and the Department of Geophysics at the University of Utah (T. 145); and Hogel Zoo uses UGMS craft each year to obtain birds from the lake islands for trades and exchanges with other zoos (T. 145-46).

c. The UGMS craft navigate all parts of the lake, both north and south of the railroad causeway (T. 143); and the studies being conducted now, and in progress since 1965, are projected to continue indefinitely (T. 141-42).

d. There are commercial deposits of lithic sand or lime sand, which is used as a flux in smelting operations, on the south shore of the lake, on the

west side of the lake, and to the northwest of Stansbury Island (T. 146).

14. *Donald G. Prince,* called as a witness for plaintiff, testified that:

He has been employed for 15 years last past by the Division of State Lands, State of Utah; that there has been constant leasing of the bed of the Great Salt Lake for oil and gas during these 15 years, such leases covering about 600,000 acres; the State always charges a lease rental fee; the lessees have been and are major oil companies; leases are still outstanding; several wells have been drilled; but no wells are currently in the process of being drilled (T. 127-28).

15. *John Nagel,* called as a witness for plaintiff, testified that:

He is in charge of waterfowl management for the Division of Fish and Game of the State of Utah, and has been so associated for seven years (T. 212); there are 80,000 acres of developed waterfowl habitat and an additional 80,000 acres of natural waterfowl habitat on the Great Salt Lake, plus habitat for many additional birds (T. 214); there are 5,000,000 days use per year of the lake by waterfowl and marsh related birds (T. 214).

16. *Helmut H. Doelling,* called as a witness for plaintiff, testified that:

a. He is an economic geologist at the University of Utah, employed by the Utah Geological and Mineralogical Survey, with a Ph.D. in geology (T. 293-94); his thesis for his doctorate was on the geology of an area west of the Great Salt Lake (T. 294).

b. There are valuable lead deposits near the lake, known as the Monarch Mine (T. 296); large commercial oolite sand deposits near Lakeside (T. 296) and north of the railroad causeway (T. 297); and "very pure, very good" deposits of dolomite and limestone all through the area west of the lake (T. 297); ragonite deposits in Grassy Mountains and Cedar Mountains near the lake (T. 297, 303); low grade, but potentially commercial, phostatic beds west of the Terrace Mountains (T. 298); deposits of metals, dolomite, limestone and building stone in Newfoundland Mountains and Silver Island near the lake (T. 298); and, in general, there is considerable unexplored mineral potential northwest of the Great Salt Lake (T. 299).

17. *Elmer Butler*, called as a witness for defendant, testified that:

a. He was born in Grantsville, Utah, near the Great Salt Lake, and is presently employed by the Water Resources Division of the United States Geological Survey (T. 246).

b. In connection with his employment, he participated in a water resources survey of some of the tributaries to the Great Salt Lake; this study was performed in April, 1964, when the lake was about 6.8 feet lower than at statehood and about 3 feet lower than at the time of the hearing in May, 1969 (247, 257-58); during his trip along the lake in 1964 he observed large areas of shoreland as "stretches of sand, marshy areas," and particularly in those places "where the lake had been" (T. 250); and "large areas of flats — some places its mud and salt beds" (T. 251); and, in general, that the area west of the lake was very sparsely populated (T. 247-54).

c. He also testified that he was familiar with the lake and was aware of the dolomite deposits near the lake which were shipped to the Geneva Plant of U. S. Steel for use as a flux, and that he worked at the dolomite mine as a boy (T. 261); that he was aware of "very valuable deposits" of dolomite sands on Stansbury Island which could only be shipped by boat during "expected" high cycles of the lake level (T. 262); that he was aware of valuable guano deposits shipped from Gunnison Island and Hat Island (T. 262); and knew that the livestock on Fremont Island could only be shipped by boat "or helicopter" and that the livestock on Antelope Island, during high water levels, could only be shipped by boat (T. 263-64).

B. SUMMARY OF EXHIBITS

Exhibit No.

P-1 U.S.G.S. map showing Great Salt Lake and surrounding area (T. 26).

P-2 U.S.G.S. hydrograph showing gage readings of level of Great Salt Lake from 1950 to present time (T. 27).

P-3 Diagram showing lake as it existed at statehood on January 4, 1896, including length, width, depth contours, and perimeter (T. 27).

P-4 Diagram showing longitudinal section of lake as to depth and variation in bed (T. 28).

P-5 Diagram showing longitudinal line illustrated in Exhibit P-4, and to be correlated with that exhibit (T. 28).

P-6 Early reconnaissance map of Great Salt Lake (1849-50) (T. 31).

P-7 Early 1871 mining map showing lake and location of General Connor's steamship routes on the lake (T. 32).

P-8 Historical Materials, as follows (T. 30-60):

Page 1	Use of boats in the early survey of Great Salt Lake in 1843 by John G. Fremont.
Page 2	Newspaper accounts in 1854 of launching of ship "The Timely Gull" and in 1855 of availability of sailboat "Deseret" for excursions "on reasonable terms."
Page 2-A	Account of large shipments of railroad ties on lake in 1869.
Page 2-B	Account of late 1860's and early 1870's where steamboats shipped "great quantities of ore" from south end of lake to northeast part of lake, and excursion boats capable of carrying 300 passengers.
Page 2-C	Pictures of "Lucin" as now located in San Francisco harbor, but built for and used on Great Salt Lake in construction of Lucin Cutoff trestle by Southern Pacific Company in 1906.
Pages 3-5	Newspaper advertisements in 1875 and 1876 promoting commercial passenger service on ship "General Garfield." The advertisements also reflect the variety and volume of commercial shipments, *e.g.*, on page 4: "On and after Au-

gust 1st the regular rates on Ore, Bullion, Coke, Charcoal and Coal will be $2.15 per ton between Salt Lake City and Halfway House in lots of not less than 12,000 lbs. loaded and unloaded by the company, and $2.00 per ton when not loaded or unloaded by the company. Freight for the west will be received on weekdays only from 7 a.m. to 10 a.m. and forwarded the same day, while that received from 10 a.m. to 6 p.m. wil be forwarded the next day. For any further information concerning freight, apply to J. N. Pike, Gen'l Freight Agent, G. W. Thatcher, Gen'l Passenger Agent, H. P. Kimball, Gen'l Superintendent."

Page 6 — Newspaper advertisement in 1877 reporting resort activities, including row boats and sail boats.

Page 7 — Newspaper advertisement and sketch of "grand opening" of Garfield Beach in 1887.

Page 8 — Newspaper advertisement of resort activities at Garfield Beach - including boating - in 1896, the year of Utah's statehood.

Page 9 — Photographs of steamship "General Garfield" and shipping dock at Halfway House near Lake Point.

Page 10	Photographs of "General Garfield" on Great Salt Lake.
Page 11	Photographs of boats at Garfield Beach.
Page 12	Photographs of "General Garfield" and Saltair, the latter being constructed in 1893, three years before Utah's hood in 1896.
Page 13	Photographs of Saltair and Garfield Beach.
Page 14	Photographs of Saltair.
Page 14-A	Photographs of Saltair in about 1909 and Black Rock in about 1900.
Page 15	Extract from publication discussing sheep, cattle, horses, cedar posts and buffalo being shipped on lake in 1870's.
Pages 16-A thru 16-D	Account of shipment of sheep (300 head per boat load), cattle, ore, salt, cedar posts (3,000 on top deck) — using several boats, including "Lady of the Lake," a flat boat for cattle, and a 75 foot salt transport boat—and shipping much cargo to a railhead in Davis County.
Page 17	Reference to "City of Corinne" carrying 400 sheep per load, and a picture of the Miller Brothers' boat.
Pages 18-A and 18-B	Extract from compilation by Kate Carter, identifying and

discussing several of the important early boats used on Great Salt Lake, and explaining that at one point the shipment of gold ore was a commercial incentive in addition to passengers and other freight.

Page 19 — Agreement whereby Central Pacific Railway Company in 1903 paid $2,500.00 to owner of Fremont Island as compensation for interference with navigation rights by construction of railroad trestle across lake from Ogden to Lucin.

Pages 20-22 — Extracts from Journal of Captain David L. Davis, who for fifty years (beginning in 1868) continually operated commercial and pleasure boats on the lake.

Pages 23-A thru 23-D — Excerpts from an article written by Mr. and Mrs. Stephen L. Richards about navigation experiences of Captain Davis on the Great Salt Lake.

Page 24 — Copy of Constitution of The Salt Lake Yacht Club.

Page 25 — Copy of certificate of membership in Salt Lake Yacht Club, signed by Captain Davis in 1874.

Pages 26-A thru 26-D — Various newspaper accounts in 1870's and 1880's showing

	illustrative commercial and recreational boating activities on the lake.
Page 27	Newspaper account April 20, 1926 of the death of Captain David L. Davis, ending "50 year Lake voyaging."
Pages 28-30	Pictures of boat referred to in Journal of Captain Davis.
Page 31	Account of Captain Edwin G. Brown and his many boating activities on the lake prior to his death in 1937, including heading the Salt Lake Yacht Club, which then "owned over forty craft on Great Salt Lake."
Page 32	Photographs of Great Salt Lake boats and dock facilities.
Page 32-A	Photograph of boat used to haul supplies, cattle and buffalo from Antelope Island to mainland near date of statehood, and picture of Zillah Walker Manning, a witness (see T. 220-22).
Page 33	Newspaper advertisement listing "moonlight boating" by Saltair Resort in 1909.
Pages 34-A thru 34-D	Newspaper accounts in 1909 of various boats and boating activities on the Great Salt Lake.

P-9 Photograph of steamboat "Promontory" (T. 60).

P-10 Specifications for ship "Promontory" (T. 60).

P-11 Photograph of Salt Lake County Boat Harbor (T. 60).

P-12 Photograph of scow driver (derrick on a boat on lake) (T. 109).

P-13 Publication of Brotherhood of Engineers' Monthly Journal, discussing construction of Lucin Cutoff trestle, and use of fleet of boats consisting of seven tug boats, sternwheel steamer, numerous small boats, and nine gasoline launches, each capable of carrying from 15 to 35 persons "for a sail on the lake." (T. 109).

P-14 Publication showing photographs of boats of Utah Geological Survey currently in use on the lake (T. 144).

P-15 Copy of Senate Bill 25 introduced in the 91st Congress to create Antelope Island National Monument on Great Salt Lake (T. 130).

P-16 Map prepared by National Park Service with respect to congressional hearings on S.B. 25, and showing facilities of Antelope Island State Park on Great Salt Lake (T. 136).

P-17 Copy of lease agreement showing rental of Utah Geological Survey boat for scientific purposes at the rate of $550.00 per day (T. 142).

P-18 Copy of Utah statutes creating Great Salt Lake Authority and Utah Park and Recreation Commission, and assigning jurisdic-

tion over lake and boating activities. (T. 138).

P-19 Drawings and specifications of patrol boats currently in use by Southern Pacific Company on Great Salt Lake (T. 150).

P-20 Album of photographs of barges, tugboats, other craft and operations during construction of railroad causeway on Great Salt Lake (T. 185).

P-21 Pamphlet of specifications of barges and marine craft used in construction of railroad causeway on lake (T. 189).

P-22 Article on Commercial Transportation on the Inland Waterways, showing commercial barges in common use today that could successfully navigate Great Salt Lake (T. 205).

P-23 Motion picture with sound track showing barge and marine operation during construction of railroad causeway (T. 204).

P-24, 25 Photographs of 42 foot steel boat of Utah Geological Survey, as used for scientific purposes (T. 211).

P-26-28 Photographs of sailboats during 1968 sailboat regatta on Great Salt Lake (T. 211).

P-29 Photograph of present appearance of Little Valley boat harbor and dock area, having been constructed for use during railroad causeway project (T. 211).

P-30 Publication on Bird Life of Great Salt Lake by William H. Behle (T. 213).

P-31 Copy, Senate Hearings on S.B. 265 (Great Salt Lake Lands Act) (T. 237).

P-32 Copy, House Hearings on H.R. 1791 (Great Salt Lake Lands Act) (T. 237).

P-33 Copy, House Committee Report on H.R. 1791 (Great Salt Lake Lands Act) (T. 237).

P-34 Copy, Senate Committee Report on S.B. 265 (Great Salt Lake Lands Act) (T. 237).

P-35 Copy, Utah Senate Bill 8, accepting federal conditions of Great Salt Lake Lands Act (T. 237).

P-36, 37 Copy, documents showing federal recognition of state ownership of waterfowl areas located on lake bed lands (T. 238).

P-38 Documents relating to Willard Bay impoundment as part of Weber Basin Project, showing purchase by the United States from the State of Utah of portion of lake bed lands (T. 238).

P-39 Copy, Utah statute and U.S. statute relating to Bear River Bird Refuge, showing mutual recognition by U.S. Congress and Utah Legislature that Great Sale Lake was navigable (T. 242).

P-40 Contract showing present mining and removal of lime sand for flux from Stansbury Island on Great Salt Lake (T. 285).

D-1 Map of Antelope Island and southern part of Great Salt Lake (T. 30).

D-2 Map of Great Salt Lake, prepared by U.S. G.S. (T. 245).

D-3 Historical Materials relating to boating on Great Salt Lake (T. 268).

D-4 Report by U.S. Army Corps of Engineers concerning feasibility of building new boat harbor on Great Salt Lake (T. 281).

C. SUMMARY OF PHYSICAL CHARACTERISTICS OF GREAT SALT LAKE AT STATEHOOD.

The preceding summary of the testimony of witnesses and the identification of exhibits illustrates the clear capacity of the Great Salt Lake to support commercial navigation and the many and varied uses made of the lake for that purpose. This section of the brief is simply a recapitulation of some of the highlights of that evidence which shows the physical capability of the lake at the date of statehood to support commercial navigation, as demonstrated by some of the major uses made of the lake at times when the water level was lower than at statehood. In other words, if the lake at a depth of approximately 26 feet successfully supported the fleet of commercial vessels used for the construction of the railroad causeway, then the lake certainly could have supported the same craft at the date of statehood when it was approximately five feet deeper.

This section of the brief, then, is only an abbreviated recital of some of the highlights contained in the foregoing sections summarizing the evidence, and those preceding sections should be reviewed in detail for a much more complete picture of the navigation uses on the lake and the lake's capability of supporting such navigation. Therefore, in a nutshell, the following are some of the most significant physical characteristics and capabilities of the Great Salt Lake (at the date of statehood) with respect to its navigability:

1. The Great Salt Lake, at statehood, was a relatively large body of water, 77 miles long, 32.5 miles

wide, and 30 feet deep; the areas of the lake which had a depth of 30 feet or more were not narrow channels, but were several miles wide and extended substantially throughout the length of the lake; and some of the world's largest barges, as used during the railroad causeway construction and when fully loaded drawing 13 feet of water, actually operated from east to west across the width of the lake, and could have operated over practically the entire length of the lake, as shown on the area included within the contour line on Exhibit P-3 at elevation 4185 feet (or a water depth greater than 15.8 feet at statehood). See, generally, Exhibit P-3 and T. 175, *et. seq.*, see also Exhibit P-2, which is the U.S. G.S. hydrograph showing gage readings of the level of Great Salt Lake from 1850 to the present date, and showing the lowest level of the lake at a depth in excess of 20 feet, the level at statehood at a depth in excess of 30 feet, and the current level in May, 1969 at a depth in excess of 26 feet.

2. The Great Salt Lake at statehood was susceptible of serving as a useful highway of commerce and supporting those types of commercial water craft then in use, including all of the barges in use anywhere in the world at that time (T. 207-08); the lake, at a level five feet lower than at statehood, in fact supported the causeway marine fleet that included deck barges each capable of transporting 1,600 tons per trip (more than 13 times the capacity of the steamer mentioned by the Court in *The Daniel Ball, supra,*) and larger dump barges each capable of transporting a much greater per trip tonnage (equal to the tonnage that 90 railroad cars would have been capable of hauling).

3. The Great Salt Lake was and is particularly economical for navigation, because:

(a) The water does not freeze in winter, as illustrated by the fact that the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. 177);

(b) Harbor and dock facilities are easy to construct, as illustrated by the fact that the harbor dredged at Little Valley near Promontory Point was 400 feet wide and 1,500 feet long and was unusually inexpensive because it was clay with very little rock (T. 181); due to lack of currents and tides in the lake, the harbor did not silt or fill and during the two years of continual use no further dredging, cleaning or maintenance was required (T. 182-84); and, in general, the cost of harbor construction and maintenace on the Great Salt Lake was "appreciably less" than on other inland waterways customarily used for navigation (T. 184).

(c) The greater bouyancy of the waters of the Great Salt Lake make navigation more economic than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171); the dump barges that operated fully loaded on Great Salt Lake with a 13 foot draft would have required a 15½ foot draft on the Mississippi River, and since that river has a 9 foot governing channel, could only have operated there with a partial load (T. 175-76); and barges in common use today, such as grain barges, cement barges, petroleum barges and all other commer-

cial barges shown in a publication entitled "Commercial Transportation on the Inland Waterways," published by the Society of Naval Architects and Marine Engineers (Exhibit P-22), could operate fully loaded on the Great Salt Lake (T. 206).

To emphasize again, the foregoing review of the physical susceptibility of the Great Salt Lake for commercial navigation does not include references to the many actual navigational uses of the lake. The latter are included in Sections II A and II B.

FINDINGS OF FACT

Finding No. 1. The Great Salt Lake was located entirely within the State of Utah on January 4, 1896, the date at which Utah obtained statehood, and at all times since has been and now is located entirely within said State.

Reference: Exhibits P-1, P-2 and P-3.

Finding No. 2. The general physical characteristics of the Great Salt Lake as of January 4, 1896, may be summarized as follows:

a. The lake had a maximum length of 77 miles; a maximum width of 32.5 miles; and a depth approximating 30 feet. The bottom of the lake was, and has continued to be, relatively flat.

Reference: Exhibits P-3, P-4 and P-5.

b. The lake has no outlet; is fed by a number of

tributary rivers, the principal ones of which are the Jordan River, Weber River and Bear River; experiences seasonal fluctuations averaging between one and two feet in vertical elevation each year; and has a salt or brine concentration in the water in excess of 20%.

Reference: Exhibits P-1, P-2, and T. 171-72.

c. The lake affords a more economic commercial navigation than most inland navigable waters of the United States because the salt concentration in the water (1) gives a much greater buoyancy than either fresh water or sea water, thus supporting greater loads with less draft; and (2) permits ice from freezing in winter months, thus permiting year-round navigational uses. Further, harbor construction is less expensive because the material dredged is clay rather than rock, and harbor maintenance is less expensive because there are no tides and currents to cause filling or sedimentation.

Reference: Thomas T. Lundee, witness for plaintiff, T. 171, 175-176, 177, 182-84.

d. The lake on January 4, 1896 was physically capable of supporting those types of water craft which were commonly used for commercial navigation on inland navigable waters on said date, including the largest barges then in use anywhere in the world; and is now physically capable of supporting barges and similar craft in common current use for navigation on inland navigable waters of the United States.

Reference: Thomas T. Lundee, witness for plaintiff, T. 206-08, Exhibit P-22. During the construction

of the Southern Pacific railroad causeway in 1957-59, when the lake successfully supported some of the world's largest barges, the lake was five feet lower or shallower than at statehood; and, further, in 1963-64, at the lowest or shallowest point in the lake's 119 year history of recorded elevation readings, the lake had a depth in excess of 20 feet (Exhibit P-2 (hydrograph)).

Finding No. 3. Indicative of the fact that the Great Salt Lake is and at the date of statehood was susceptible of commercial navigation, it is found that the Great Salt Lake either has been or currently is being navigated for various purposes, including shipment of cattle, sheep, horses, buffalo, ores and minerals, fence posts, railroad ties, guano, commercial salt, decorative salt crystals and rocks, farm machinery, grain, household supplies and pump station supplies; and has also been navigated for the construction of a railroad trestle and causeway, recreation craft for paying passengers and for commercial hire or rental, private craft for recreation, scientific investigative purposes, railroad maintenance patrol, law enforcement patrol, rescue operations, and the harvest of brine shrimp.

Reference: The early history of navigation on the Great Salt Lake is illustrated quite well in the compilation of historical materials contained in Exhibit P-8. This collection covers a period of time commencing more than forty years before statehood and continues for a number of years after statehood. Only limited references to that material will be made here, but the entire contents are very enlightening and should be examined in conjunction with T. 30-69, which is an explanation by plaintiff's counsel of the importance and relevance of that material. See also the Summary of Exhibits contained in this brief.

The following references are cited with respect to different types of navigational uses, although many boats were used for several purposes, such as hauling passengers, ore, livestock and other products. The references include not only historical materials, but also testimony from live witnesses and the evidence contained within the various exhibits.

a. *Livestock,* including cattle, sheep, horses and buffalo.

Joseph S. Nelson, witness for plaintiff, T. 85-86, 89, 93-94, 96-97.

Zillah Walker Manning, witness for plaintiff, T. 217-19, 221-22, 227-28.

Leon L. Imlay, witness for plaintiff, T. 70-71.

Exhibit P-8, pages 15, 16-A through 16-D, 17, 19, 32-A.

b. *Ore and Minerals.*

Exhibit P-8, pages 2-B, 4 (ore, bullion, coke, charcoal, coal), 16-A through 16-D, 18-A and 18-B (gold).

Exhibit P-8, pages 9, 10.

c. *Fence Posts and Railroad Ties.*

Exhibit P-8, pages 2-A, 15, 16-A through 16-D.

d. *Guano.*

Phil Dern, witness for plaintiff, T. 116-17, 123-24.

Leon I. Imlay, witness for plaintiff, T. 70-71.

Elmer Butler, witness for defendant, T. 262.

e. *Commercial Salt.*

Exhibit 8, pages 16-A through 16-D (special 75 foot salt transport barge).

f. *Decorative Salt Crystals and Rocks.*

John Clawson Silver, witness for plaintiff, T. 289.

g. *Farm and Industrial Machinery.*

Zillah Walker Manning, witness for plaintiff, T. 222.

Phil Dern, witness for plaintiff, T. 124.

h. *Grain.*

Zillah Walker Manning, witness for plaintiff, T. 223.

i. *Household Supplies.*

Exhibit P-8, page 32-A.
Zillah Walker Manning, witness for plaintiff, T. 220.

j. *Pump Station Supplies.*

Leon L. Imlay, witness for plaintiff, T. 68-69, 73.

k. *Construction of Railroad Trestle.*

Exhibit P-8, pages 2-C
Exhibit P-9
Exhibit P-10
Exhibit P-12
Exhibit P-13

l. *Construction of Railroad Causeway.*

Thomas T. Lundee, witness for plaintiff, T. 166-210.
Exhibit P-20
Exhibit P-21
Exhibit P-22
Exhibit P-23
Exhibit P-29

m. *Commercial Recreation Craft.*

Exhibit P-8, pages 2, 2-B, 3-5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 14-A, 20-22, 23-A through 23-D,

26-A through 26-D, 27, 28-30, 31, 32, 33, 34-A through 34-D.

Exhibit P-9

Exhibit P-10

Exhibit P-11

Exhibit P-13

Leon L. Imlay, witness for plaintiff, T. 62-68.

Joseph S. Nelson, witness for plaintiff, T. 83-92.

Claire Wilcox Noall, witness for plaintiff, T. 75-79.

Francis W. Kirkham, witness for plaintiff, T. 233-34.

Phil Dern, witness for plaintiff, T. 111-116, 119.

John Clawson Silver, witness for plaintiff, T. 287-91.

Reese F. Llewellyn, witness for plaintiff, T. 104-107.

Harold J. Tippetts, witness for plaintiff, T. 129-37.

n. *Private Craft for Recreation.*

Exhibit P-8, pp. 20-22, 23-A through 23-D, 24, 25, 26-A through 26-D, 27, 28-30, 31, 32-A through 34-D.

Exhibit P-11

Exhibits P-26, P-27, P-28.

Leon L. Imlay, witness for plaintiff, T. 62-68.

Joseph S. Nelson, witness for plaintiff, T. 83-92.

Claire Wilcox Noall, witness for plaintiff, T. 75-79.

Phil Dern, witness for plaintiff, T. 111-116.

Reese F. Llewellyn, witness for plaintiff, T. 104-07.

Harold J. Tippetts, witness for plaintiff, T. 129-37.

o. *Craft for Scientific Purposes.*

William P. Hewitt, witness for plaintiff, T. 139-46.

Exhibit P-8, page 1, and T. 34.
Exhibit P-14.
Exhibit P-17
Exhibits P-24, P-25

p. *Railroad Maintenance Patrol.*

Exhibit P-19
Golden O. Peterson, witness for plaintiff, T. 148-56.
Joseph S. Nelson, witness for plaintiff, T. 96.

q. *Law Enforcement Patrol.*

Reese F. Llewellyn, witness for plaintiff, T. 105-06.
Harold J. Tippetts, witness for plaintiff, T. 132, 134.
Exhibit P-18.

r. *Rescue Operations.*

Harold J. Tippetts, witness for plaintiff, T. 132.
Reese F. Llewellyn, witness for plaintiff, T. 105-06.

s. *Brine Shrimp Harvest.*

Gail Sanders, witness for plaintiff, T. 157-64.

CONCLUSIONS OF LAW

Conclusion No. 1. The Great Salt Lake was susceptible of being used for commercial navigation on January 4, 1896, the date at which Utah obtained statehood; and was therefore a navigable body of water, and the State of Utah on that date received title to the bed of the Great Salt Lake.

Reference: Findings of Fact and Summary of Evidence, and cases cited in Memorandum.

Conclusion No. 2. Issues of law raised by the plaintiff relating to equitable estoppel against the United States and compromise and settlement between Utah and the United States should be reserved for subsequent determination, if any such determination becomes necessary. Likewise, all issues relating to the exact boundary of the bed of the Great Salt Lake as of January 4, 1896, as well as the ownership of lakebed lands now uncovered by the receding waters of the lake since said date of statehood, should be reserved for subsequent determination.

Reference: Memorandum, including footnote No. 1 at page 3.

V. CONCLUSION

The Great Salt Lake, world famed for its resorts and for the buoyancy of its waters, and one of the largest lakes in the Western Hemisphere not interconnected to an ocean, is challenged in this proceeding as to its navigability. The question is whether on January 4, 1896, the date of Utah's admission into the union, the lake was physically susceptible of commercial navigation. The uncontroverted evidence shows that the lake was not only susceptible of commercial navigation at that date, but was actually used for commercial navigation at, before, and after the date of statehood, and is being so used at the present time. As an example, from 1957 until 1959, when the lake was about 5 feet

lower (or shallower) than it was at the date of statehood, the lake supported some of the world's largest barges (each capable of carrying the equivalent tonnage of 90 railroad cars) as part of a marine fleet that constructed the Southern Pacific Company's causeway across the lake, a $49,000,000.00 job which at that time was considered to be one of the great engineering feats in history. The barges were so large that they could not have navigated when fully loaded on the Mississippi River, but they navigated without difficulty on the Great Salt Lake, day and night, winter and summer, during the two year construction period. The Great Salt Lake was not only navigable, but was unusually economic to navigate, because of greater buoyancy of the water, the absence of ice, and the ease with which harbor facilities could be constructed and maintained.

The Court should adopt the proposed Conclusions of Law, as fully supported by the proposed Findings of Fact.

Respectfully submitted,

VERNON B. ROMNEY
Utah Attorney General

ROBERT B. HANSEN
Deputy Utah Attorney General

DALLIN W. JENSEN
Assistant Attorney General

RICHARD L. DEWSNUP
Special Assistant Attorney General

CLIFFORD L. ASHTON
Special Assistant Attorney General

EDWARD W. CLYDE
Special Assistant Attorney General

Counsel for Plaintiff
236 State Capitol Building
Salt Lake City, Utah 84114

August 1, 1969

CERTIFICATE OF SERVICE

I, Vernon B. Romney, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C., 20530; by mailing the same, air mail postage prepaid, this 30th day of July, 1969, all in accordanc with the Rules of this Court.

VERNON B. ROMNEY
Utah Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT
(BEFORE THE SPECIAL MASTER ON REFERENCE)

BRIEF OF THE UNITED STATES WITH RESPECT TO THE NAVIGABILITY OF THE GREAT SALT LAKE

INTRODUCTION

The only question now before the Special Master is whether or not the Great Salt Lake is navigable. The State of Utah contends that it is; the United States contends that it is not. Should we prevail on this issue that would be an end of the case, since the sole basis of Utah's claim to the lands in dispute, whether now submerged or exposed, is that they were once part of the bed of a *navigable* body of water and, as such, passed to the State upon Utah's admission to the Union. On the other hand, if Utah prevails on the question of navigability, further proceedings will be necessary to determine other issues, notably whether

the State lost its original title by operation of the law of "reliction" as portions of the former lake bed became exposed.[1]

Two propositions set the framework for the consideration of the navigability of the Great Salt Lake. The first is that the burden of proof is on the proponent of navigability—here Utah. See *Harrison* v. *Fite*, 148 Fed. 781, 785 (C.A. 8); *Iowa-Wisconsin Bridge Company* v. *United States*, 84 F. Supp. 852, 867 (C. Cls.). The second proposition is that "[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts." *United States* v. *Holt Bank*, 270 U.S. 49, 55–56; *Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U.S. 77, 87; *United States* v. *Utah*, 283 U.S. 64, 75; *United States* v. *Oregon*, 295 U.S. 1, 14. It follows that the decisions of the Supreme Court of Utah taking judicial notice of the navigability of Great Salt Lake,[2] cannot be deemed to have established the Lake's navigability for our purposes. The question is, rather, whether the State of Utah, in the recent proceedings before the Special Master, has succeeded in showing that Great Salt Lake is a navi-

[1] As we read Utah's brief (pp. 1–4), there is no dispute between the parties on this point. The State's insistence (Br. p. 2.) that navigability is a "preliminary" issue, not a "basic" one, is presumably no more than an assertion that it must prevail on this question.

[2] *Robinson* v. *Thomas*, 75 Utah 446, 286 Pac. 625; *Deseret Livestock Co.* v. *State*, 110 Utah 239, 171 P. 2d 401.

gable body of water according to the rules recognized and applied in federal courts.

We turn first to those governing legal standards, concluding, in sum, that navigability as a basis for a State claim to submerged lands requires a finding that the body of water was used, or at least useable, at statehood as a commercial highway. We then undertake a detailed canvas of the evidence presented at the hearing. The historical materials, we find, reveal very little actual navigation of the Lake and none of the relevant kind at the critical time. Finally, we deal with the suggestion that the Great Salt Lake was, and is, *potentially* an artery of commerce.

GOVERNING LEGAL PRINCIPLES

At the outset, it may be useful to restate how the issue of navigability arises in the case. Utah's claim to the original bed of the Great Salt Lake (whether now submerged or exposed) ultimately rests upon the proposition that these lands passed to the State upon its admission to the Union. This results, it is said, from the operation of the "equal footing" principle which, as construed in *Pollard's Lessee* v. *Hagan*, 3 How. 212, and subsequent cases, requires that the newly admitted States be accorded the same property interest in submerged lands as was enjoyed by the thirteen original States as successors to the rights of the British Crown. And so we are finally led to the English law which viewed the beds of the great navigable rivers of the realm as belonging to the sovereign, rather than to the riparian landowners.

The governing notion apparently was that the principal highways of water commerce—which in England are the tidal rivers—ought to be treated as public assets, immune from the claims of private landowners. That rationale is, of course, equally applicable in this country. It is merely an anomaly of our constitutional history that, here, the public interest in navigable waters, as such, is administered by the federal government (to which the Constitution delegates admiralty and maritime jurisdiction and power to regulate interstate and foreign commerce), while the public interest in excluding the riparian owners from the underlying lands is manifested in State custody of the beds (because the original States, rather than the Union, immediately succeeded to the sovereign prerogatives of the British Crown and never ceded their rights in the water bottoms to the national government, see *Martin* v. *Waddell*, 16 Pet. 367, 410, 416). The fact that, in the United States, one sovereign regulates navigation and another owns the beds does not suggest different tests as to what constitutes a "public" river. On the contrary, since the overriding reason for keeping the beds out of private ownership is to prevent interference with the free use of navigable waters as commercial highways, see *Barney* v. *Keokuk*, 94 U.S. 324, 338, one would suppose that a State claim to submerged lands should attach only with respect to the beds of rivers or lakes the waters of which are subject to the federal navigational servitude.

That would certainly be the rule if the English example had been followed strictly. For the common law conceded to the Crown only the beds of navigable *tidal* waters, which were of course arms of the sea subject to the jurisdiction of the Admiralty and arteries of foreign commerce. To be sure, this equation of navigability with tide-water was early found ill-suited to the geography of America and rejected, both as a restriction on the federal admiralty jurisdiction (see *The Propeller Genesee Chief*, 12 How. 443, 454–459), and as a test of navigability for property purposes as well (*Barney* v. *Keokuk*, *supra*, 94 U.S. at 337–338). But the single federal standard that seemed to emerge was, in the words of the *Genesee Chief*, waters "on which commerce is carried on between different states or nations."

In light of this history underlying State ownership of the beds of the navigable waters, the question arises whether the rule is operative with respect to lands under rivers or lakes which are not within the federal admiralty jurisdiction or subjected to federal regulation under the Commerce Clause because they do not form part of a navigable interstate or international commercial highway—and are, accordingly, not "navigable waters of the United States." See *The Daniel Ball*, 10 Wall. 557, 563; *The Montello*, 11 Wall. 411, 415; *Moore* v. *American Transportation Company*, 24 How. 1, 39; 33 U.S.C. 2.10–5(a). Although there is of course no constitutional obstacle to recognizing State ownership of the beds of wholly land-locked intrastate waters, confining the doctrine to channels of interstate

or foreign commerce would serve the advantages of a single uniform federal test of navigability which, in practice, would allow public ownership under all important water highways. If the matter were open, we might invoke that limitation here, since the Great Salt Lake has no navigable connection beyond Utah. However, because we read the opinions in *United States* v. *Utah, supra,* 283 U.S. at 75, and *United States* v. *Oregon, supra,* 295 U.S. at 14, as foreclosing the argument, at this juncture, we merely preserve the point in the event it seems appropriate to urge reconsideration of the *Utah* and *Oregon* decisions when the Special Master's report is before the Court.

We now turn to the test of navigability on the assumption that an interstate connection is *not* essential for present purposes. The classic definition of navigable waters occurs in *The Daniel Ball, supra,* 10 Wall. at 563:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * *

Although that was a case construing the Commerce Clause, the definition just quoted is almost invariably cited in both admiralty cases (*e.g., In re Garnett,* 141 U.S. 1, 15), and cases involving State title (*e.g., United States* v. *Utah, supra,* 283 U.S. at 76). Like Utah (see Br. 8–10), we accept the passage as generally stating the applicable law.

What *The Daniel Ball* teaches is that navigability in fact, in federal law, is more than ability to float a vessel. A body of water is navigable in fact only if, in its natural condition, it is useable as a "commercial highway." The last expression carries several relevant implications:

> That the movement is a purposeful aspect of the flow of goods or passengers from one point to another, rather than, say, the aimless cruising of pleasure boats or even the scheduled round trips of a sightseeing or excursion vessel;
>
> That the commerce involved is, at least potentially, of substantial volume and frequency;
>
> That the use of the body of water for transporting goods or people is practical, including, presumably, physical possibility and economic feasibility.

These characteristics have been listed as ingredients of navigability in all contexts. But, whatever the appropriateness of demanding so much to establish admiralty jurisdiction, or congressional power under the Commerce Clause, it is clear that these are the enduring criteria of navigability in connection with determining a State claim to the bed of an inland lake or river. Thus, a navigable body of water in this sense has been defined as a waterway which has "capacity for practical and beneficial use in commerce" (*Oklahoma* v. *Texas*, 258 U.S. 574, 591), or, more directly, as "a channel for useful commerce." *Brewer-Elliott Oil and Gas Co.* v. *United States, supra,* 260 U.S. at 86; *United States* v. *Holt Bank, supra,* 270 U.S. at 56; *United States* v. *Utah, supra,* 283 U.S. at 76. The matter is well summed up in the landmark opinion

of Judge Hook in *Harrison* v. *Fite*, 148 Fed. 781, 783 (C.A. 8), approvingly cited by the Supreme Court in several decisions (*e.g.*, *Oklahoma* v. *Texas*, *supra*, 258 U.S. at 591; *United States* v. *Oregon*, *supra*, 295 U.S. at 23):

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. * * *

It only remains to stress one aspect of the test of navigability which is unique to the State title context: that is the *time* when the water course must be navigable. The time is *not* the present, as it is for the pur-

pose of admiralty jurisdiction. See *The Robert W. Parsons,* 191 U.S. 17, 28. Nor may we follow the generous test applicable to the exercise of congressional powers under the Commerce Clause, which treats as subject to regulation waters which were once navigable but are no longer (*e.g., Economy Light Co.* v. *United States,* 256 U.S. 113, 123–124), or which only recently have become passable (*e.g., Philadelphia Light Co.* v. *Stimson,* 223 U.S. 605, 634–635), and, also, streams which are not now, and never have been, navigable, but may become so in the future by improvements (*e.g., U.S.* v. *Appalachian Power Co.,* 311 U.S. 377, 409; and see 33 U.S.C. 2.10–5). For the purpose of determining a State claim to water bottoms the inquiry as to navigability is limited to the date of the State's admission to the Union; all else is irrelevant. *Shively* v. *Bowlby,* 152 U.S. 1, 18, 26; *United States* v. *Utah, supra,* 283 U.S. at 75; *United States* v. *Oregon, supra,* 295 U.S. at 14; *Oklahoma* v. *Texas, supra,* 258 U.S. at 591, 594; see *United States* v. *Appalachian Power Co., supra,* 311 U.S. at 408.

An important corollary of the rule that navigability must be shown at Statehood, not at some future time, is that the water course should be judged in its natural state. Future improvements that would remove obstacles to commerce or otherwise improve navigability are not relevant.

This is not to say that actual use of the river or lake as an artery of commerce at the date of the State's admission is essential. As *United States* v. *Utah, supra,* 283 U.S. at 82, explained: "where con-

ditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." Thus, one may judge navigability by assuming a natural development of the area and considering whether the stream or lake, given its geographic setting, its dimensions and direction, will likely become a commercial highway. But, the potential of a water course as an artery of commerce may be obviously lacking from the beginning, despite its ability to float a large vessel. And subsequent history will often be relevant in confirming that appraisal.

ACTUAL NAVIGATION ON THE LAKE

In an appendix to this brief (App. 2, *infra*, pp. 43–59)[3] we have detailed every known instance of navigation on the Great Salt Lake.[4] We submit that a careful analysis of this history shows that the Lake never served as a commercial highway, certainly not since Statehood. We turn to that demonstration.

The evidence relative to boats plying the Lake reveals uses in seven categories: (1) pleasure; (2) ex-

[3] An abbreviated, but complete, listing in tabular form follows the narrative. App. 3, *infra*, pp. 60–63.

[4] Two boats referred to in the evidence are not listed; these are the "Rosie Brown," built by Thomas G. Brown, and named for his daughter, and the "LaVon," built by T. G. Brown, the son of Thomas Brown. The "Rosie Brown" was used to "haul salt from beds somewhere along the [Bear] river to the railroad at Corrine"; the "LaVon," was "a motor launch capable of carrying 25 passengers at a time, and used for pleasure cruises and hunting trips." Both boats are omitted because they seem to have been used only on the Bear River. The evidence does not reveal when these boats were used. Ex. D–3, p. 270.

cursions; (3) the hauling of sheep and cattle; (4) the construction of railroad lines across the lake; (5) surveys, explorations, and scientific studies; (6) commercial trade and (7) miscellaneous. In addition, the evidence reveals only the existence, but not the use, of a number of boats, and these may be assigned to an eighth category, that of "use unknown." [5]

1. The first category, that of pleasure boats, contains the greatest number of vessels. Undoubtedly, such boats as may have been on the Lake and which are not referred to in the evidence introduced in this case would be rowboats, sailboats and gasoline launches falling into this category. And the boats only generally referred to—the forty yachts mentioned in Item 60, the unknown number of boats which participated in the regatta mentioned in Item 73—all of these appear to have been private craft used solely for recreation and pleasure.

It should here be noted that (with perhaps one exception mentioned later) the only boats using the Salt Lake County Boat Harbor pictured in Exhibit P–11, and occasionally referred to at the hearing, were pleasure boats. The harbor was not built until the 1930's and in 1949, only about ten years after its completion, was found to have been neglected, "and not satisfactory for the 50 boats moored there." Ex. D–4, Item 00, pp. 7 and 8. This finding was made by the United States Army Corps of Engineers, which at the direction of Congress was conducting a study to de-

[5] Appendix 4, *infra*, p. 64, is a table indicating into which category the defendant believes should be placed each of the instances listed in Appendices 3 and 4.

termine whether or not the Government should participate in a project to improve the harbor. The final recommendation of the Corps was that improvements should not be undertaken.

Ten years later the harbor was again inspected by an agent of the federal government, this time in connection with a proposal that Great Salt Lake be made a national monument. According to this report, conditions there had deteriorated (Ex. D–4, Item D, pp. 6 and 7):

> Located a mile or so east of Sunset Beach, this harbor is apparently operated by Salt Lake County. It is certainly the largest, and possibly the only, harbor on the lake developed for the use of private pleasure boats. The harbor consists of a small dredged channel with dilapidated boat shelters along one side. The silting in this channel causes a serious maintenance problem. At the time of our visit a scoop was in operation cleaning out muck clogging the channel entrance.
>
> The harbor facilities presented the same general appearance of decay noted elsewhere. About 30 boats, ranging from rowboats to large cabin cruisers, were tied up in the boat sheds. Some of the boats were complete wrecks. All showed the ravages of erosion caused by the high salt content of the Great Salt Lake waters. The boat houses and other structures are complete shacks, almost beyond repair. The only exception was the boat house belonging either to the U.S. Navy or Coast Guard.
>
> If this harbor is any indication, Great Salt Lake is not a popular boating area. Further

> evidence of this is the fact that no boat of any kind was seen on the lake during the entire study.

The lack of pleasure boats on the Lake was not a phenomenon confined to 1959; in 1902, in a geography book apparently designed to be used in the Utah public school system, the statement is made of Great Salt Lake that (Ex. D–3, p. 127):

> Though the air is very invigorating and healthful on account of the salt spray, there is very little sailing upon the lake because of the unpleasant effect of the salt which crystallizes upon the body and clothes in thick scales from every drop of water which strikes them. Salt water soon destroys leather and rubber and causes disagreeable cracks in the skin, when it is not washed off by fresh water. The waves are very heavy and roll lazily even in severe storms.

But these comments on the harbor are a digression: even were the harbor in excellent condition, and used by a fleet of 500 pleasure craft, that use for that purpose would not under federal law permit a determination that the Lake is navigable for the purposes of vesting in the State title to the bed thereof.

2. The second category is of boats used for excursions: thirteen boats devoted to this activity have been identified in the evidence. The excursion trips appear for the most part to have lasted from twenty minutes to three hours, but sometimes boats were hired for tours of longer duration.

Obviously, to be a highway of trade and travel, a body of water ought to lead somewhere, and lend itself to being used by traffic to get from one end to the

other. A boat which ventures forth on a 2,000 square mile body of water for twenty minutes, and then without having in the interim discharged freight or passengers, returns to the place from which it started, cannot be said to have been engaged in "useful commerce", or to have demonstrated the Lake's "useful capacity as a public highway of transportation." If the existence on a body of water of excursion boats, or any boats hired for pleasure, could be construed to establish the navigability of that body of water, then the Lake in the Public Garden in Boston, plied regularly in the summer by a fleet of swan boats, would be a navigable body of water, as would countless other small ponds in parks throughout the country.

3. The third category is of boats used to haul cattle and sheep. Nine such boats can be identified in the evidence; in every case save one where there is information on the subject, however, it appears that the boats used to haul the sheep and cattle were the property of the owner of the stock, and that the hauling was done, not by a carrier for the purpose of making money by the act of carriage, but by a person or organization whose business was ranching and for whom the carriage of the stock to the mainland from either Antelope or Fremont island was only one step in an operation not centering on the use of the Lake as a highway for trade and travel in their customary modes on water. In other words, the business of the boats was ranching, not carrying waterborne freight; the boats were sustained on the Lake from the proceeds of the ranching operation, not from their profits as carriers.

This may, perhaps, be deemed an unimportant distinction; it could be argued that whether a boat used to haul stock is owned by the rancher himself, or by some party whose business it is to haul stock, makes no difference. But, there is, we suggest a critical distinction. The actual situation is that the carriage described served the needs only of the limited number of people who owned ranching operations along the shores of the Lake (and, indeed, the evidence shows that, in the entire history of the Lake, the only ranching operations which have used boats have been those of four or five people or organizations [6]—who have used Fremont or Antelope Island for grazing their sheep or cattle). This, we submit, hardly demonstrates that the lake has a "practical usefulness to the public as a public highway."

What is true of the boats which were apparently owned by the ranchers themselves is also true of the one boat used to haul stock that was not owned by a rancher: this was Mr. Backman's boat which was used—and presumably especially hired for this—to carry sheep to Fremont Island for the owners of that island. One sheep boat for hire does not make an artery of commerce; especially if it was only hired by one person—the owner of Fremont Island—and was useful only in one activity—the hauling of sheep to and from that island.

[6] These are, on Fremont Island, the Millers (up to 1884) and the Wenners (from 1884 on); on Antelope Island, the Mormon Church, originally, then (apparently) White and Sons, and finally, the Island Improvement or Island Ranching Company, which, in 1967, sold its land to the State of Utah.

4. What has been said of the inability of the limited use of boats for hauling stock to show the "practical usefulness" of the Lake to the public as a commercial highway applies with even more force to the fleets of boats which twice came on the lake, not to engage in trade or travel, but to construct across its waters first, in 1902, a railroad trestle, and then in 1957, a solid landfill causeway. While on the lake, these vessels were not instruments of commerce in the customary modes of trade or travel on water; they were construction equipment. After their work was completed, the steamboats, tugboats and barges, aside from a few craft which continued to be used for regular inspection checks of the trestle and causeway, all left the lake, for there was no traffic or other activity on the lake requiring their presence.

5. The fifth category, which consists of boats used to explore the Lake, or of boats which once were or now are engaged in scientific study on its waters, no more are indicative or probative of the utility of the lake for trade or travel than are the Apollo expeditions to the moon proof of the existence today of interplanetary commerce.

6. The sixth category consists of boats which appear in fact to have used the lake as a highway for commerce in the customary mode of trade and travel on water.

There are seven such boats: the first was the "Timely Gull" (Item 7), which was on the lake from 1854 to 1858, and appears to have been used not only

to haul church cattle to and from Antelope Island, but also to carry and trade in cedar, salt, and slate flagging.

The next two boats, the "Pioneer" (Item 15) and the "Kate Connor" (Item 16) both belonged to General Patrick Connor, and were both used in 1867 and 1868 to transport railroad ties from the mountains south of the lake eighty-five miles to where the Union Pacific Railroad was being built on the north of the lake, "where there was no timber (nor, in fact, anything else)." Ex. P–8, p. 17. How long the "Pioneer" was thus used is not known (although the railroad, of course, was completed in 1869), nor is anything known of its ultimate fate. The "Kate Connor" was not a financial success. Ex. P–8, p. 17. Although there is a reference to the "Kate Connor's" having sunk with a load of ore in about 1871 (Ex. P–8, p. 18B; Ex. D–3; p. 192), the journal of Christopher Layton reveals that the boat was bought by him in 1872 and used for a number of years thereafter for hauling sheep to Antelope Island for the church. Ex. D–3, p. 69. The "Kate Connor," therefore, has either been confused with some other boat which did sink, or after sinking, was raised and restored to use. Like the "Pioneer," its end is unknown; Alfred Lambourne, on Gunnison Island in 1895, mused on a piece of wreckage cast up on the shore and used for firewood (Ex. D–3, p. 140):

> Perhaps the relic that fed our flames was a bit of the old *Pioneer,* or it may have come from the *Star of the West.* Maybe it was a piece

from the ribs of the *Kate Connor,* whose skeleton lay for several years at one of the river mouths; or it may have come from the Stanbury scow, the *Salicornia;* or from the *Pluribustah,* or other boat with equally *un*euphonious name.

The next use of the lake as a highway for trade or travel also involved the transportation of railroad ties to the site of the construction of the railroad. The ties, however, were not carried in a boat; rather, lashed together, the ties constituted a raft (Item 18 in our list of boats). Given its purpose, this raft of ties crossed the Lake only once, of course, and it was never followed by a second. Ex. D–3, p. 191.

This brings us to the most famous boat ever on the lake, the "City of Corinne" (Item 19). It was launched in June, 1871, and was intended to be used for carrying passengers and freight, but its life in this capacity was less than one year. By June 1872, it had been converted into an excursion boat. In 1881, it was moored permanently at Garfield Landing, and was used as a hotel.

The last two boats which were used to any extent for trade and travel were both used by the Miller family: The "Lady of the Lake" (Item 32) in the 1880's, in addition to hauling sheep to and from Fremont Island, was used for hauling ore, salt and cedar posts. Its use by the Millers ceased well before 1891. Another boat (Item 34) built and used by the Millers carried salt from various salt works around the lake to a railroad connection. The exact dates of this use are unknown; it was probably in the 1880's.

These seven boats comprise the lake's entire commercial fleet, and the first five, at least, were in use for purposes of trade and travel for very brief periods of time. Only one of them, the "City of Corinne" had regularly scheduled passenger and freight service across the lake, and this service lasted for less than a year.

7. The seventh category is of boats devoted to miscellaneous uses: the rowboat (Item 9) which took Brigham Young to Antelope Island in 1856, while the team "forded the water to the island"; the "Star of the West" (Item 15) which once carried a "cargo of Salt," and which another time was used to supply water to a party surveying the lake, it having "no other known claim to fame," (Ex. D–3, p. 187); the four boats (Item 61) which in 1935 searched for a plane downed on the lake, and one of which was thereafter given to the Salt Lake County Sheriff's office; the LCI used for hauling guano (Item 66), which is the one boat other than a pleasure boat which may have used the Salt Lake County Boat Harbor, and which is not included among the boats in category 6 because it is subject to the same objection against being considered as engaged in trade or travel as are the boats used for hauling stock; the boat (Item 69) used by John Clawson Silver as a "promotional and goodwill ambassador"; the barge (Item 70) used by Mr. Silver to haul salt crystals "not to sell" but just "for decoration and pleasure"; and the "crash boat" (Item 77) supposedly operated on the Lake by the Hill Air Force Base. Also included here are the boats

(Items 71 and 72) used by the Sanders Brine Shrimp Company for harvesting brine shrimp from the lake.

8. All that need be said of the boats in the last category is that the evidence discloses that they were on the lake, but reveals nothing about their uses.

Thus, the evidence shows that in the 145 years since the discovery of the lake, there have been on its surface but seven vessels unmistakably engaged in trade or travel in the customary mode of trade and travel on water. The trade conducted by these vessels was sporadic; their careers were short. The only one of these vessels to carry passengers and freight on a regular schedule was in service for less than a year. A correlation of the dates when these seven boats were on the lake with the graph (Ex. P–2) showing the levels of Great Salt Lake from 1850 to 1968 (see Appendix 8) reveals that all these boats were launched at a time when the level of the lake was much higher than it was on the date of statehood in 1896. Indeed, the evidence indicates that all commercial traffic on Great Salt Lake had *ceased* by 1888, well before Utah became a State, and during a period when the level of the lake was higher than it has ever again reached.

And not one true use of the lake as a highway for trade and travel has occurred *since* the date of statehood. On the basis of actual use for trade and travel, the lake obviously is not, and was not on the date of statehood, navigable as a matter of fact.

SUSCEPTIBILITY OF THE LAKE TO USEFUL NAVIGATION

No doubt sensitive that the actual record of navigation on the Great Salt Lake may well be deemed in-

sufficient, the State seeks to bolster its case by invoking the rule that, in some circumstances, navigability may be established by merely showing that at Statehood the water course was "susceptible of commercial navigation" (see Utah Br. 13). We now turn to that claim.

It is important to stress the limitations of the rule. As we have already noted, the feasibility of future artificial improvements to the water course—or indeed, the predictability of natural changes—is *not* to be taken into account in assessing navigability for the purpose of a State claim to submerged lands. The law is simply that actual navigation at Statehood need not be shown if the water course, in its then state, was susceptible of commercial navigation but was not yet so used because of prevailing "conditions of exploration and setlement." Applying that standard, we submit the Great Salt Lake does not qualify.

1. Indeed, since the Lake was discovered (1824 or 1825) more than 70 years before the date of Utah's admission to the Union (1896) and settlement of the area had largely occurred by that time, it is doubtful whether the "susceptibility" rule is appropriately invoked at all. Ever since 1850 there have been sizeable settlements near the Lake. Salt Lake City, of course, was the first, and in 1852 Stansbury remarked of it (Ex. D–3, p. 4):

> The founding, within the space of three years, of a large and flourishing community, upon a spot so remote from the bodes of man, so completely shut out by natural barriers from the rest of the world, so entirely unconnected by watercourses with either of the oceans that

> was the shores of this continent—a country offering no advantages of inland navigation or of foreign commerce, but, on the contrary, isolated by vast uninhabitable deserts, and only to be reached by long, painful, and often hazardous journeys by land—presents an anomaly so very peculiar, that it deserves more than a passing notice.

In 1856 there were over 77,000 people in the Territory of Utah (Ex. D–3, p. 24), most of them undoubtedly in the vicinity of Salt Lake City, and fifteen years later the hotels of Salt Lake City were accommodating 1,515 visitors (Ex. D–3, p. 25). By 1890 the total population of Utah was 207,905 (Ex. D–3, p. 29), presumably most of it centered then where it is now, in Salt Lake, Davis and Weber Counties, on the eastern side of the Lake (Ex. D–3, pp. 168 and 280)—which in 1960 had 558,539 residents (Ex. D–3, pp. 281 and 282).

In the circumstances, it is plain that the limited use of the Lake before Statehood cannot be attributed to the undeveloped character of the area. As the history of the Lake since 1896 sufficiently shows, time has not turned it into a useful commercial highway. The fact is that the Great Salt Lake was never "susceptible" of filling that role.

2. It is, undoubtedly, the physical situation of the Lake which is chiefly responsible for the incredibly insignificant use made of the Lake over the last 145 years. The Lake lies in a "vast, flat, sterile basin" (Ex. D–3, p. 165). It is a residue of an ancient sea, and occupies a shallow depression in the otherwise re-

markably flat plain which once was the bed of that sea (Ex. P–31, p. 27). It is the drain for a great area, the Lake itself having no outlet. When the surface of the Lake is at 4,195 feet above sea level, the maximum depth of the Lake is about 25 feet; (Ex. D–2) the *average* depth of the Lake, however, is much less. Most of the shore of the Lake has a slope of less than 1 foot in 1,000 feet (D–4, Item 00, p. 2).

Thus, all around that portion of this great flat basin covered by the waters of the Lake stretch huge expanses of smooth, flat, salt-impregnated lands not covered by the waters of the Lake. The map which accompanies the stipulation in this case, and which shows the "reliction lands", well illustrates the extent to which the flats separate the waters of the Lake from usable dry land. The flatness and shallowness of this closed basin (that is, a basin without an outlet) have a number of consequences, two of which (each being the corollary of the other) are to make the shores of the lake extraordinarily desolate, and access to the Lake extremely difficult. As Dale L. Morgan wrote, "Save only for the southeastern beaches at the base of the Oquirrhs, it [the lake] is everywhere bulwarked with mud morasses and salt marshes which have made is nearly inaccessible and have done much to preserve its atmosphere of desolate strangeness." Ex. D–3, p. 167.

There can be no question that the Lake has, in fact, preserved its desolate strangeness. The "bleak and naked shores, without a single tree to relieve the eye * * *" which Captain Stansbury saw in 1849 are

still as bleak and naked as ever. In 1861, Richard F. Burton, the famed world traveler, described the western side of the Lake as "a perfect desert—a salt and arid waste, of clay and sand, with the consistence of mortar when wet, which cannot boast of a single stream; even the springs are sometimes separated by 'jornadas' of seventy miles." Ex. D–3, p. 61. In 1959—almost 100 years later—a National Park Service reconnaissance study to determine the potentialities of Great Salt Lake as a national park or monument stated that "the entire western shoreline is a desolate inaccessible wasteland of salt flats." Ex. D–4, item D p. 4. A guidebook to the State of Utah, written in 1965, reports that "for fifty miles north of Salt Lake City, white mud flats and marshes of the Inland Sea stretch desolate and forbidding beneath the mighty wall of the Wasatch Range. The sea itself has retreated westward, as if exhausted from countless ages of beating against the impregnable mountain rampart; now it lies brooding in solitude, far from the pleasant lands that men prefer. Not many people come into intimate contact with Great Salt Lake, for it is too remote, too well protected by its shield of encircling mud and marshes." Ex. D–3, p. 165.

And, indeed, the map of the general areas of the lake introduced into evidence by the plaintiff—Ex. P–1—shows how well the lake's encircling bogs, marshes and flats fend off intruders. Except for Lakeside on the west shore of the lake—a spot inhabited by perhaps fifty people who maintain the tracks of the Southern Pacific Railway—there are no settlements or com-

munities of any kind immediately bordering on the lake. In fact—and again with the exception of the fifty-peopled Lakeside—there are absolutely no communities at all anywhere near the western and northern shores of the lake throughout all that vast area from Grantsville, which is about seven miles from the south shore of the lake, along the western and northern shores of the lake over to Brigham City, which is over twenty miles from the present waterline of the lake on its eastern shore. No settlements, communities, or towns of any kind appear on plaintiff's Exhibit 1; instead, what appears on the map for this area are a bombing and gunnery range, the Great Salt Lake Desert, a wildlife refuge, extensive salt flats, and an abandoned salt plant. Or, to put what the maps shows into the words of Dale L. Morgan: "Men have made themselves at home only along the southern and eastern shores of the lake. Except along the old route of the Central Pacific over the Promontory summit, and around the north shore, which was finally abandoned in 1942, and along the Lucin Cutoff, with its service points and sidings, the northern and western shores of the lake are almost completely uninhabited." (Ex. D–3, p. 168.)

But even along the southern and eastern shores of the lake, there are no settlements immediately adjacent to the water: all of the centers of habitation here are separated from the lake by from five to twenty miles of bogs, marshes and flats. Exhibit D–1, showing the southern portion of Antelope Island, and the shores of the lake near the old Saltair Resort, graphically

depicts the salt flats which are as characteristic of the eastern and southern shores of the lake as they are of the western; as an 1892 guidebook stated with respect to a beach at that time about six miles from Syracuse: "like the entire east shore, this place is too flat and the bottom too muddy for fine bathing." Ex. D–3, p. 114. The small communities of Hooper, Roy, Clearfield, Syracuse and Kaysville; the large communities of Brigham City, Logan, Ogden and Salt Lake City: all are from five to twenty miles from the salt water. (Ex. P–1; Ex. D–2; Ex. D–3; p. 169; Tr. p. 254.) Says the same 1892 guidebook: "The nearest point to the lake from Salt Lake City is about ten miles distant, but it is almost inaccessible on account of the boggy character of the ground." (Ex. D–3, p. 113.)

It is but one aspect—although in this case a very important aspect—of the general inaccessibility of the lake resulting from the flatness and gradual shelving of the basin in which it is located, that it is unusually difficult to get boats from dry land across the boggy marshes into floatable water. References to this difficulty abound in the literature on the lake, beginning with the Mormon settlers who in 1848 explored the lake in their skiff on wheels, the "Mud Hen." They found, after rowing down the Jordan River to the lake, that (Ex. D–3, p. 53):

> The Jordan suddenly spread out without leaving any channel that would float our boat. We stepped out and drew our boat four miles, water varying from one to four inches, bottom sandy, covered with two or three inches of slime or soft mud; we did not discover a living thing

> in the water; water fowl in great abundance. Got aboard and steered for the first island (Antelope) hauled our boat over a bar one half mile, and when one and a half or two miles off the island the water again shoaled so that our boat struck bottom.

All through the course of their journey, they were obliged to haul their boat one, two or three miles to get into the eight or so inches of water needed to float it (Ex. D–3, p. 54); and when finally they returned to Salt Lake City, they "got into shoal water and when within one and a half mile of land ran aground," upon which "each one took his gun and provision and walked to land." (*Ibid.*) After completing the trip, one of the members of the party, Brother Hambleton, "suggested, what we considered a very appropriate and characteristic name for the lake, *viz.*, 'the briny shallow' in contradistinction to the 'briny deep.' " Ex. D–3, p. 54.

Shallow water and the constant running aground of his yawl and skiff plagued Stansbury during his survey of the Lake in 1850. Approaching the Lake from the Jordan River, he found, as had the party on the "Mud Hen" before him, that the "channels became less defined and more shallow as we advanced" (Ex. D–3, p. 7.) "We were therefore obliged to unload the boat entirely * * *. After six hours of severe labour, we at length succeeded in reaching water that would float our little craft * * *." (*Ibid.*) Later "a line of soundings was run until midway, when the boat grounded" (Ex. D–3, p. 9). "The skiff was sent ahead with an officer, but it was soon left on

the flat, and the party waded through soft mud and water to the shore" (Ex. D–3, p. 9). "Starting from the springs with the boats, we attempted to make our way to the point where the eastern range seemed to terminate; but the water was so shallow that it was impracticable. After many fruitless attempts, the boat was brought as near the shore as possible, part of the baggage loaded into the skiff and pushed toward the land. It was impossible, however, to bring even this light barque nearer than within a quarter of a mile of the beach, and the luggage was transported to shore on our shoulders." (Ex. D–3, p. 12). "Moved again today, with the intention of encamping at the head of this arm of the lake, but the water became so shallow that not even the skiff would float, and we had to resort to the usual process of transporting beds and baggage on our backs to the shore." (Ex. D–3, p. 14.) "Anchoring our boat to keep her from drifting off, we waded some half-mile to the shore, and proceeded nearly three miles inland on our bare feet, over a sandy flat, and plunged through thick, oozy mud nearly knee-deep until we reached the growth of reeds we had seen from the boat." (Ex. D–3, p. 16).

Further to catalogue here the instances supporting Stansbury's statement that he was "continually baffled by shoals, which could not be seen until the boat grounded upon them" (Ex. D–3, p. 21), is not necessary; suffice it to conclude with Stansbury's remark, when a portion of his party using the skiff was for a time lost because of a storm, "The loss of the skiff is severely felt the nature of the shore being such that

the large boat, when loaded, cannot, in many places, approach within two or three miles of the land, and the lighter vessel is therefore indispensable." (Ex. D–3, p. 19).

And again, a hundred years later, the situation was still the same. At a public hearing held in Salt Lake City on July 10, 1946, to consider the advisability of providing a harbor for light draft vessels on Great Salt Lake, Dr. Thomas C. Adams said (Ex. D–4, Item QQ, p. 15):

> The particular needs of boat operators are for deep water, protected anchorage and tying space of ample size, and with utilities and services customarily required at small harbors. On Great Salt Lake they need, in effect, access to the Lake which in its natural stage is surrounded insofar as boat operation is concerned with an almost impenetrable barrier consisting of broad continuous belt, a very gently sloping, soft, sandy beach and adjoining shelves. Boats of any consequence cannot be operated, cannot be maintained or outfitted, or even placed in the water under such circumstances.

Dr. Adams' testimony is of particular significance because of his special knowledge of the Lake; Dale L. Morgan, in 1946, described him as "an engineer long concerned with the lake and as commodore of the Great Salt Lake Yacht Club [he] has an unequaled fund of information about the lake which he has been at pains to place at my disposal." (Ex. D–3, p. 214.)

Another consequence of the physical situation of the Lake—its being in a closed basin, without an outlet—

is that the level of the Lake is subject to marked fluctuation. (Ex. D–3, pp. 274 to 278). And, since the basin in which the Lake is located is so flat, the fluctuations in the level of the Lake result in the covering or uncovering of large areas of lands. This condition further thwarts use of the Lake. An example of this is what happened after the reconstituted Great Salt Lake Yacht Club started to use the pier at Saltair in the late 1920's (Ex. D–3, p. 211):

> But that deadly lake level, which so often had disastrously intervened upon boating activities, either by rising to flood shore facilities or by so far withdrawing from them as to render them useless, once again began its assault upon the enthusiasm for yachting. The facilities at Saltair, between 1928 and 1935, became increasingly less satisfactory as the lake shrank upon itself. It was difficult to reach the boats, for the increasing shallowness of the water necessitated anchoring farther and farther out from the pavilion. And even when the water was deep enough to allow the boats to come to the pier, there was not protection from waves and storms.

In fine: the shallowness of the Lake, the difficulty of access to it, the great distances from the far water line of the Lake to depths capable of floating a boat, the inhospitable nature of the great bogs, marshes and salt flats surrounding the Lake, the desolateness of the immediate environs of the Lake, are physical features of the lake which negative its susceptibility to use as a highway of commerce; these physical features coupled with the facts that there are no com-

munities along the shores of the Lake, although the Lake is within twenty miles to half the population of Utah, and that in the 145 years that people have been living near the Lake, it has been but sparsely used, there having been no true commercial use of the Lake after the date of Statehood, nor to any marked extent for twenty-five years prior to the date of Statehood· all this compels the conclusion that the Lake, as a matter of fact, was not navigable at the time of the admission of Utah into the Union.

CONCLUSION

Great Salt Lake is, as the State remarks, one of the largest bodies of water in the Western Hemisphere (Br. p. 52). An outsider, seeing on a map of the United States a large patch of blue second only to the Great Lakes, would naturally impute to the area the activities customarily associated with bodies of water of this size: substantial cities which are centers of commerce whose vessels engage in intensive trade with each other by regularly plying the waters of this large lake. He would of course be wrong. The inutility, the foresakenness, of the Lake, and its commercial irrelevance to the area in which it is situated, have long been known to the local inhabitants who have observed it over the years. We need only cite guides to Utah prepared in the 1870's and 1880's, which, in referring to the "General Garfield," consistently point out that "this boat is used chiefly for excursions, there being no business to justify Great Salt Lake navigation" (Ex. D–3, pp. 75 (1879), 88 (1884); 102 (1888), and 107 (1888).

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The matter is well summed up by Dr. Thomas C. Adams (whose particular qualifications to express a view on the subject we have already discussed) in testimony before the Senate Subcommittee on Public Lands in 1965 (Ex. P–31, p. 141):

> The navigability of the lake is obviously a matter for serious question. The lake is not now nor has it ever been a channel of commerce. On three historical occasions the water level has become so low due to natural causes that the prevailing belief was that the lake would dry. The only attempt, many years ago, to pursue regular commerce was shortlived and commercially not successful. Other operations of craft have been in the nature of desultory recreational boat with small craft transportation of livestock to and from summer ranges in some high-water years, or a few operations of floating construction equipment which might equally have been conducted in a swamp. The shores of the lake have rarely been usable for boat landings, no usable piers now exist, and the only attempt to construct and operate a public harbor of refuge has been abandoned. * * * The State of Utah has been completely unmindful about navigability of the lake, contributing in no way to this by regulation or public works and often proposing to do things or allowing others to do things which seriously impair the physical navigability of the lake.

As Dale L. Morgan's book on Great Salt Lake puts it: "The lake has never been hospitable to commercial boats * * *," and "has had only the most negligible of influences in the economy of its hinterland" (Ex.

D–3, pp. 173 and 213). This is what the evidence presented in the hearing in this case bears out—both the positive evidence as to the difficulty of use, and the negative evidence as to actual use.

The United States urges the Special Master to find the Great Salt Lake is not navigable and to adopt the proposed Findings of Fact and Conclusions of Law appended hereto.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Deputy Solicitor General.

MARTIN GREEN,
Attorney.

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APPENDIX 1

Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. The State of Utah was admitted into the Union on January 4, 1896 [29 Stat. 876].

2. Great Salt Lake is a nontidal body of water entirely within the State of Utah. [Exs. P–1, P–2, P–3, D–4, Item 00, p. 3.]

3. The Bear, Weber, and Jordan Rivers flow into Great Salt Lake. The Weber and Jordan Rivers are entirely within the State of Utah; the Bear River originates in Utah, but flows through Wyoming and Idaho before reaching Great Salt Lake. [Exs. P–1, P–6, P–7, P–32, p. 33.]

4. Great Salt Lake has no outlet. Within historic times, it has had a maximum length of approximately 77 miles, a maximum width of approximately 32.5 miles, and a maximum depth of about 30 feet. [Exs. P–1, P–2, P–3, P–4, P–5.]

5. The Lake occupies a flat, relatively shallow basin in the area known as the Great Basin. It is bordered on the east by the Wasatch Mountains, and on the west by the Great Salt Lake Desert. The Oquirrh Mountains are located on the south and several small mountains are situated on the north. [Exs. P–1, D–4, Item 00, p. 2.]

6. The shore of the Lake has a slope of less than 1 foot in 1,000 feet. Except for an area at the southeastern shore of the Lake, at the base of the Oquirrah Mountains, the Lake is surrounded by flat stretches of

salt marshes and bogs, sometimes several miles in width. [Exs. P–1, D–3, p. 167, D–4, Item QQ, p. 15.]

7. Settlement in the vicinity of the Lake began in about 1847; the area on the eastern shore and within twenty miles of the Lake has always been the most populated portion of the State; in 1960, the number of persons in Davis County, Salt Lake City and Ogden, all of which areas are within twenty miles of the Lake, was approximately 325,000, and comprised almost half of the population of the State of Utah. [Ex. D–3, pp. 4, 168, 169, 280, 281, 282.]

8. Except for Lakeside on the west shore of the Lake, which has a population of about 50 people who maintain the tracks of the Southern Pacific Railway, there are no communities immediately bordering the Lake. On the eastern and southern shores of the Lake, there are no communities nearer than four miles to the waters of the Lake; on the western and northern shores, except for Lakeside, there are no communities anywhere near the Lake within the State of Utah. [Ex. P–1, Tr. 253.]

9. The Lake is physically capable of supporting large boats, barges and similar craft currently in general use on bodies of water other than Great Salt Lake. [Tr. 202–208.]

10. A total of forty boats can be identified as having been on the waters of Great Salt Lake from 1824 until the admission of Utah into the Union in 1896.

11. Exclusive of craft used to construct or maintain the railroad across the Lake, approximately fifty craft can be identified as having been on Great Salt Lake since the date of Utah's admission into the Union.

12. The activities engaged in by the vessels known to have been on the Lake since 1824 include: (1) transporting passengers, ore, fence posts, railroad ties

and salt; (2) hauling livestock to and from Antelope and Fremont Islands as part of the operations of a ranch; (3) carrying guano as part of a company operation from Gunnison and Bird Islands to the mainland; (4) the harvesting of brine shrimp; (5) the construction and maintenance of railroad lines across the lake; (6) excursions; (7) the exploration and scientific study of the Lake; (8) private recreation and pleasure; and (9) rescue operations.

13. In the total history of the Lake, only seven boats can be identified as having engaged in the activity of commercially transporting passengers, ore, fence posts, railroad ties and salt. Only one of these vessels, the *City of Corinne*, engaged in regularly scheduled freight and passenger service. It began these operations in June 1871 and terminated them in June, 1872. One of these "vessels," a raft of railroad ties, had been on the Lake one time only, in 1869. All of these boats had been used on the Lake and had ceased operations prior to the admission of Utah into the Union, and five of these boats had either been wrecked or had not engaged in the activity of carrying passengers, ore, fence posts, railroad ties and salt for at least twenty-five years prior to the admission of the State of Utah into the Union in 1896.

14. The only dock ever along the Lake available for use by the general public was the Salt Lake County Yacht Harbor, which was completed in 1939 and was no longer significantly used in 1960. [Ex. D–4, Item C, p. 1.]

15. At no time since 1824 did or could vessels on the Great Salt Lake travel by water from the Lake up any of its affluents to any place outside of the State of Utah. [Ex. P–32, p. 33.]

CONCLUSIONS OF LAW

1. A State upon its admission into the Union acquires by virtue of its sovereignty title to the beds of all the navigable bodies of water within its borders.

2. In any proceeding involving the question of the navigability of a body of water, the burden of proof is always on the proponent of navigability.

3. Navigability, when asserted by a State as the basis of its title to lands underlying bodies of water, is necessarily a question of federal law to be determined according to the general rule recognized and applied in federal courts.

4. Navigability under federal law, when asserted by a State as the basis of its title to lands underlying bodies of water, must be determined as of the date of the admission of the State into the Union.

5. To be navigable under federal law, a body of water must constitute a highway of commerce over which trade and travel is or may be carried on in the customary modes of trade and travel on water. Mere depth or expanse of water, without profitable utility, will not render a water course navigable in the legal sense.

6. The commerce which must be shown to exist or to be capable of existing on a body of water in order for that body of water to be deemed a navigable water for the purpose of vesting in the State title to its bed must be practical, useful and beneficial to the public. The fact that it is used for pleasure boating, or to enable fisherman to float their boats, is not sufficient. A theoretical or potential use for commerce, or one that is temporary, precarious, and unprofitable, is not sufficient.

7. In determining the navigability of a body of water in an area which was populous and had been

long settled at the time of the admission of the State in which it is located into the Union, the actual use or nonuse of that body of water as of the date of Statehood will be deemed most persuasive.

8. The use of boats by the owners of Fremont and Antelope Islands in Great Salt Lake to carry sheep and cattle back and forth from their island grazing fields to the mainland in connection with their business operation, as well as the use of such boats to carry supplies to employees of these islands, where such activity was carried on on behalf of not more than five people or organizations, cannot be deemed to show the utility for commerce to the general public of the waters of Great Salt Lake.

9. The hauling of guano from Gunnison and Bird Islands in Great Salt Lake cannot be deemed to show the utility of the waters of Great Salt Lake to the general public, where nothing is known as to the date or the extent of the guano hauling operation on Gunnison Island, and it appears that only one boat was used, fifty years after Statehood, and then for a period of not more than nine years, in hauling the guano from Bird Island.

10. The use of boats for harvesting shrimp from the Lake is not trade and travel on water in the customary modes of trade and travel on water.

11. The use of boats for the construction and maintenance of a railroad across the Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

12. The use of boats to take persons on pleasure excursions of the Lake, where such excursions are for the most part from twenty minutes to four hours in duration, the boats then returning to the point whence they had departed, without having discharged any passengers on the way, is not trade and travel on

water in the customary modes of trade and travel on water.

13. The use of boats for the exploration and scientific study of Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

14. The use of boats for recreational and pleasure sailing on the Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

15. The use of boats for police patrol activities and rescue operations does not constitute trade and travel on water in the customary modes of trade and travel on water.

16. A showing that in the last 145 years, only seven boats on Great Salt Lake have been devoted to the hauling of passengers and freight, only one of which operated on a regular schedule (such operation not lasting more than one year); that of the seven boats, five were either no longer in existence or no longer carrying passengers and freight at least twenty-five years prior to Statehood, while either the existence or activities of the other two boats at the date of Statehood is unknown; that all seven of these boats were operating on the Lake at a time when the level of the Lake was much higher than it was at the date of Statehood, and much higher than it has ever been since again, is not sufficient to establish that Great Salt Lake was, at the time of the admission of Utah into the Union on January 4, 1896, a highway of commerce over which trade and travel were or could have been carried on in the customary modes of trade and travel on water.

17. A showing that after Statehood, there were no boats at all engaged in the carrying of passengers and freight, even though the population in the area con-

tinued to increase; that such uses as were made of the Lake after Statehood were extremely limited in scope, and of no commercial importance or consequence to the general public living in the vicinity of the Lake; that there never was more than one harbor on the Lake accessible to the public, which harbor was in use only after about 1935, and was never used by any vessel carrying passengers or freight from one part of the Lake to another, save for a guano boat, if that be deemed an exception, and which harbor is not now in use; that the Lake is surrounded by extensive marshes, bogs and flats which make access to it difficult; that the shores and bed of the Lake generally have a slope of less than one foot in a thousand feet, a condition which makes the launching of craft on the Lake difficult; that with the exception of the railroad settlement at Lakeside, which has a population of about 50 people, there are no communities immediately on the shores of the Lake, nor within at least four or five miles of the short of the Lake; such a showing is sufficient to warrant the conclusion that Great Salt Lake's susceptibility to use as a highway of commerce is too conjectural and hypothetical to establish its navigability for the purpose of vesting to the State title to the bed thereof.

18. Great Salt Lake was not on the date of Utah's admission into the Union navigable under the laws of the United States, and title to the bed of the Lake, therefore, did not on January 4, 1896, vest in the State of Utah, but remained in the United States.

19. The lands conveyed to the State of Utah on June 15, 1967, pursuant to the Act of June 3, 1966 (80 Stat. 192), include all of the lands below the meander line of Great Salt Lake as depicted on the map attached to the Stipulation filed by the parties in

this case, subject to the reservations and conditions set forth in the Act of June 3, 1966, *supra*.

20. The State of Utah having had no title to the bed of Great Salt Lake prior to the conveyance thereof to the State by the United States on June 15, 1967, is required, in order to retain title thereto in accordance with the Act of June 3, 1966, *supra*, to pay to the United States within two years from the date of the decree herein the fair market value of the entire bed of the Great Salt Lake below the meander line of that Lake, as that value shall be determined by the Secretary of the Interior as of the date of the decree herein.

APPENDIX 2

1. The first boat ever on the Lake[1] was the bull boat (a shallow draft tub-shaped boat made of buffalo skins) of Jim Bridger, to whom the credit for discovering the Lake is usually given. The traditional story is that Bridger was one of a party of trappers who, while travelling along the Bear River, began to speculate as to the course and destination of that stream. A wager was made, and Bridger, the youngest member of the crowd, was chosen to learn the answers. This was either late in 1824, or early in 1825. Bridger sailed down the stream and in due time reached Bear River Bay, where, after tasting the water, and spitting it out, he concluded that he had reached the shores of the Pacific Ocean. Ex. P–8, p. 18A; Ex. D–3, pp. 252 and 254.

2. In 1826 James Clyman and three companions "searching for beaver skins" circumnavigated the Lake in bullboats. There is no evidence that beaver skins were ever found, or that the Lake was ever used by trappers for the transportation of pelts. Ex. P–8, p. 18A; Ex. D–3, pp. 32, 251 and 254.

3. In 1843, the explorer John B. Fremont, in the company of Kit Carson and several others, sailed in an eighteen foot long "frail batteau of gumcloth distended with air, and with pasted seams" to the island in Great Salt Lake which now bears his name. Ex. P–8, p. 1; Ex. D–3, pp. 93, 252 and 254.

4. The first vessel put on the Lake by the Mormon

[1] There is no authentic record of the Indians ever having placed any boats on the Lake. Cf. Ex. D–3, p. 12.

settlers of the Great Salt Lake Valley was the "Mud Hen," which, in 1848, at the direction of Brigham Young, carried Albert Carrington and others on a two week exploring trip of the Great Salt Lake and its islands. The "Mud Hen" was a skiff on wheels, made of five fir planks. It was 15 feet 4 inches long and 4 feet 4 inches wide. Ex. P–8, p. 18A; Ex. D–3, pp. 53, 54 and 180.

5. In the spring of 1850, Captain Howard Stansbury of the U.S. Army Topological Survey Corps launched on the Great Salt Lake a yawl which had been built during the preceding winter, and in this yawl he and his company made the first accurate survey of the Lake. The yawl was named "Salicornia" or "Flower of Salt Lake" by the exploring party, but was generally referred to only as "The Sally." Ex. P–8, p. 18A; Ex. D–3, pp. 5, 8, 22, 180 and 261.

6. Along with "The Sally," Captain Stansbury used during his survey of the Lake in 1850 a small skiff. Ex. P–8, p. 18A; Ex. D–3, pp. 8 and 22.

7. On January 30, 1854, Brigham Young launched his boat, "The Timely Gull." It was 45 feet long, and although designed for a stern wheel to be propelled by horses working a treadmill, it was in fact always propelled by wind and sail. The boat was used primarily to carry church cattle to Antelope Island, but it was also used to transport cedar wood, salt and flagging, as well as for pleasure excursions. The boat was wrecked by a gale in 1858. Ex. P–8, pp. 2 and 18A; Ex. D–3, pp. 24, 40, 180, 182, 183, 229 and 272.

8. A notice published in the "Deseret News" on May 9, 1855, by one J. Cowdy announced that "the sail boat 'Deseret' is now ready to take parties out on the water, for pleasure excursions, either on Jordan or Salt Lake on reasonable terms * * *." Ex. P–8, p. 2.

9. When Brigham Young visited Antelope Island in 1856, he was taken there from the shore of the Lake in a rowboat used by Joseph Toronto and Peter O. Hansen "while the teams forded it." Ex. D–3, pp. 38 and 229.

10. In 1865, David L. Davis, who was originally from Wales and had arrived in Salt Lake City the year before, was sailing on the Great Salt Lake in "the brave sloop 'Eureka,' which was among the first pleasure craft on the Great Salt Lake * * *," and was the first of many pleasure craft used by "Captain" Davis during the following 50 years. The "Eureka" was 19 feet long with a six foot beam, and was on the Lake for about 8 or 10 years after 1865. It was engaged by the United States Geological Survey in 1869 for use in surveying the lake. Sailing was Captain Davis' hobby and recreation—he was for many years the "Captain" of the Salt Lake Yacht Club, which had for its object "the advancement of the general interest in aquatic sports"; his trade, in which he had been engaged since he was 14 years old, was that of a merchant. Ex. P–8, pp. 20, 23B, 23D, 24, 25 and 27.

11. For a number of years in the 1860's there was on the Lake the "lonesome pleasure yacht" of the Walker Brothers, who were merchants in Salt Lake City. Little is known about this boat, except that it was built by Gammon Hayward, and was a sailboat, "designed purely for pleasure purposes." Ex. P–8, p. 18A; Ex. D–3, pp. 75, 102, 188 and 209.

12. In September, 1867, Elbert Eastam and Ben Hampton, "having built a yacht at Bear River bridge, sailed down Bear River to G.S. Lake, 75 miles, thence up the Jordan River to G.S.L. City, making the journey in two days." Nothing else is known about this yacht. Ex. D–3, p. 57.

13. On April 14, 1867, John B. Meredith arrived near the bridge on the Jordan River, with the schooner "Star of the West," having a cargo of salt from Great Salt Lake, "he claiming it was the first voyage up the river from the lake, thus proving the river navigable." There is no record of this boat's ever having carried another cargo of salt. In June, 1868, the boat was used to supply water to a survey party headed by one F. C. Hodges, and in the course of this enterprise was swept by a gale onto some rocks, where it was broken. There is no evidence that it was ever floated again. Ex. P–8, p. 18A; Ex. D–3, pp. 56, 140 and 189.

14. On March 7, 1869, David L. Davis and one James Glade "went down to the river in W. D. Williams' boat." There is no evidence as to what kind of boat this was, or what it was used for. Ex. D–8, p. 20.

15. As the Union Pacific and Central Pacific Railroads were extended toward each other in the race to complete the transcontinental railroad (the driving of the Golden Spike joining the two halves of the continent took place at Promontory, immediately north of Great Salt Lake, on May 10, 1869), "there was a boom in the market for lumber, and in its wake Great Salt Lake for the first time began to commend itself for commercial navigation." in 1867 or 1868, General Patrick Connor, who had come to Utah with the United States Army to police the State, and had decided to stay, launched on the Lake the "Pioneer," a flat-bottomed sail boat used for carrying railroad ties. How long it was in use is unknown, but its hulk was eventually abandoned at the mouth of the Jordan River. Ex. P–8, p. 23C; Ex. D–3, pp. 140, 190.

16. Apparently General Connor had a contract with the Union Pacific Railroad to supply it with ties. For this purpose, on December 11, 1868, he launched on the Lake its first steamboat: the "Kate Connor,"

named for his daughter. The boat was a side wheeler 55 feet long, and with a beam of 18 feet. It was built by Gammon Hayward, and was used for carrying railroad ties and telegraph poles to Promontory. The boat was not a financial success. Although most of the writers who mention the boat say that it sank in 1871, the boat actually was purchased in 1872 by Christopher Layton, and thereafter used for a number of years to haul sheep to and from Antelope Island (apparently for the Mormon church). Ex. P–8, pp. 17, 18A, and 23C; Ex. D–3, pp. 69, 75, 190, 192, 245 and 254.

17. General Connor also put on the Lake in 1869 the "Pluribustah," a schooner of 100 tons burthen. Almost nothing is known about this vessel. Ex. P–8, p. 18B; Ex. D–3, pp. 75, 102, 190 and 219.

18. In order to supply the demand for railroad ties needed for the construction of the Utah Central Railroad (which connected with the Union Pacific at Ogden) timber was cut and hewed in Dry and Pine Canyons in the winter of 1868–9, hauled to the Lake, and there built into a large raft, 300 feet long by 16 feet wide, which was then poled to the vicinity of Farmington, where it was dismantled, and the ties carried to the construction site. Ex. P–8, p. 2B; Ex. D–3, p. 191.

19. On May 24, 1871, the "City of Corinne," was launched in the Bear River. Except for the barges used in 1957 to 1959 to construct the railway causeway (see Item 67, *infra*), this is the largest boat ever to have been on Great Salt Lake, being a three-decker steamboat, 150 feet long and of 250 tons burthen, propelled by a large paddle wheel at her stern. In early June, 1871, it began to carry ore and passengers from Lake Point, on the south shore of the Lake, to Corinne, on the Bear River on the northeast shore of the Lake, making three trips a week. But within a few

months—by the end of 1871—the boat was reported a financial failure, and in April, 1872, the boat was sold to the Lehigh and Utah Mining Company, and was immediately converted into an excursion boat. By June, 1872, the boat was operating as an excursion steamer out of Lake Side, on the east shore of the Lake below Farmington. In 1875, the boat was renamed the "General Garfield," and moved its home port to Lake Point, also known as Clinton's Landing, on the south shore of the Lake, where it took pleasure seekers 15 or 20 miles out into the Lake in the course of two hour cruises. In 1881, the boat was permanently moored by its then owner, Captain Douris, a short distance west of Black Rock, at a place which came to be known as Garfield Landing, and was used as a hotel and restaurant, its paddle wheel, smokestacks and machinery having been removed. In 1904, the boat caught fire and was destroyed. Ex. P–8, pp. 3, 4, 5, 23C and 26C; Ex. D–3, pp. 25, 74, 75, 88, 163, 193, 206, 207, 229, 244, 253 and 254.

20. On August 9, 1871, John W. Young, a son of Brigham Young, launched "The Lady of the Lake," a "tiny steamboat." This vessel was 30 feet long, had a 10 foot beam, and weighed 7 tons. The boat was used only for pleasure, and although much publicized upon her appearance on the Lake, "she promptly disappeared in the prevailing fog of obscurity shrouding all the early boats." Ex. P–8, p. 18A; Ex. D–3, pp. 75, 88 and 209.

21. The "Water Witch," a yacht owned by the Salt Lake Yacht Club, appears to have been on the Lake from about 1875 to about 1880, and devoted to cruises for the pleasure of the members of the Club. On September 8, 1876, Captain Davis and others made an expedition in the "Water Witch" to determine the feasibility of making an outlet into the desert for the

waters of Salt Lake, the level of the Lake at that time being very high. They were unable to find a point for the proposed cut to be made. Ex. P–8, pp. 20, 23C, 23D and 26A; Ex. D–3, pp. 26, 80 and 225.

22. In September, 1877, Captain Davis put upon the Lake his catamaran, the Cambria, afterwards called the Cambria I to distinguish it from his later boats of the same name. It was about 19 feet long, and had a 10 foot beam. This boat appears to have been used only for pleasure cruises on the lake. It was manned until about 1891. Ex. P–8, pp. 20, 21, 22 and 23D; Ex. D–3, 80, 135, 141, 201 and 210.

23. The "Mary Askie" was one of a number of yachts owned by members of the Salt Lake Yacht Club. This yacht was owned by the Silver Brothers, and in 1877, 1878, 1879 and 1880 participated in the Club's regattas and other sports events. Ex. P–8, pp. 24 and 26A; Ex. D–3, p. 80.

24. The "Petrel" was another such yacht; it was owned by Captain Barratt, and was on the Lake at least until 1882. Ex. P–8, pp. 21, 24 and 26A; Ex. D–3, p. 80.

25. Captain Hudson's "America" was another vessel involved in the yacht club's regatta and sport activities in the late 1870's. Ex. P–8, pp. 24, 26A and 26B; Ex. D–3, p. 80.

26. "Maud," owned by Adam S. Patterson, was another yacht associated with the Yacht Club. The first reference to it is in 1880. There is no evidence that it was used for anything but pleasure and sport. Ex. P–8, p. 18A; Ex. D–3, pp. 80, 135 and 201.

27. The yacht "Pinafore" was associated with the Salt Lake Yacht Club in 1880; it had apparently been built "for the realistic presentation of an opera." Ex. P–8, pp. 18A and 30.

28. "Esther" was a small boat built by Captain

Davis; although there is no evidence as to the purpose of its use, it may have been an excursion boat. Ex. P–8, pp. 18A and 20.

29. After the conversion of the "General Garfield" into a hotel, Captain Dahl's steamboat called the "Whirlwind" took passengers on excursion trips on Great Salt Lake. There are references in the evidence to this boat's being on the Lake in 1884 and 1887. Ex. P–8, pp. 26C and 26D; Ex. D–3, pp. 88, 207 and 229.

30. Captain Douris, the former owner of the "General Garfield," also had his little side-wheel excursion steamer on the Lake; this was the "Susie Riter." The boat was on the Lake in 1886, but its total length of service was only about two years, for in a storm it went down at its anchor. Ex. P–8, p. 21; Ex. D–3, pp. 97 and 207.

31. A reference in the evidence, dated 1889, states that "the 'Eloise Sherman' is a propeller, now used for excursions." Nothing else is known of this boat. Ex. D–3, p. 98.

32. At an early date after the arrival of the settlers in the Great Salt Lake Valley, Henry William Miller and his brother, Daniel Henry Miller, occupied Fremont Island, and used it as a sheep range. Some time before 1884, Daniel Miller's son Jacob designed and helped build the "Lady of the Lake," used by the Millers to haul sheep to and from the island. The boat was 50 feet long and 12 feet wide, with two main masts, the largest one being 50 feet high. She flew four sails—two main sails and two jibs. The ship had two decks, and was capable of carrying 300 head of sheep at a time. When Judge Wenner acquired control of Fremont Island in 1884, he demanded that the Millers remove their sheep, and the boat was used for that purpose at that time. In addition to hauling

sheep, the "Lady of the Lake" was also used for hauling ore, salt and cedar posts. Eventually the ship, in a bad storm, was blown on the beach west of Farmington, where she stood for a number of years, until finally purchased by Judge Wenner (exactly when is not known, but Judge Wenner died in 1891). The ship was renamed the "Argo," and was overhauled for use in going to and from Fremont Island. It appears that this ship was eventually wrecked on the rocks at Promontory Point. Ex. P–8, pp. 16A, 16B, 16C, 16D, 17 and 18A; Ex. D–3, pp. 132, 141, 198, 229 and 236.

33. Before building the "Lady of the Lake," the Millers had used two other small boats. These may have been the sloop and schooner later sold to Charles Spackman, of Farmington, and eventually, shipwrecked near the Promontory. Ex. P–8, p. 16A; Ex. D–3, p. 236.

34. The Millers also built a 75 foot boat with three holds in it for hauling salts from various salt works around the Lake to a railroad connection. This may be the unnamed schooner referred to by Captain Davis as carrying salt from a bed a few miles north of Garfield Beach to a railroad near the Lake. In 1908, the wreck of this schooner could be seen near the tracks at Saltair. Ex. P–8, pp. 16D and 23C.

35. In addition to building boats for themselves, the Millers built prior to 1884 a cattle boat "for another company for the purpose of shipping cattle to Church [Antelope] Island." This was a flat boat about 50 feet long and 18 feet wide. Although there is no evidence in the record either to support or refute this conclusion, it seems likely that this is the cattle boat used by White and Sons, a company which carried on a wholesale butcher business in Davis County, and used Antelope Island for stock raising. The Company kept herefords from England (red cattle with white

faces and markings) as well as buffalo on the island. Their foreman on the island was William Walker, "an expert stockman," whose daughter, Zillah Walker Manning, testified at the hearing in this case. The boat was used by Mr. Walker, as an employee of White and Sons, to carry cattle to and from the island, as well as supplies for the Walker family. It was also occasionally used by the White and Walker families for pleasure trips. The boat appears to have been in use at least until 1903. Ex. P–8, pp. 15, 16D and 39A; Ex. D–3, pp. 229 and 233; Tr. pp. 219–229.

36. Living on Antelope Island at the same time as the Walkers was a George Frarey, who worked for a while at herding cattle on the Island. For this he used a "clumsy, scow-shaped cattleboat, sloop rigged with mainsail and jib, and steered by an oddly placed wheel on the forecastle deck." The boat was used for hauling cattle in 1891, and probably much earlier, but, by 1895 and at least until 1903, the boat was chiefly used for taking passengers on excursion trips over the Lake. Ex. P–8, p. 18B; Ed. D–3, pp. 195 and 196; Tr. p. 225.

37. There is also in the evidence, without any further description, a reference to "the Jake Winters' sheep boat." Ex. D–3, p. 229.

38. Another boat referred to, without any further identification, is George Payne's "Lilly of the Lake." Ex. D–3, p. 229.

39. In 1891, Captain David L. Davis supplanted his original "Cambria" with the "Cambria II," which was also a catamaran, but which was powered by the first gasoline marine engine in Utah. "Cambria II" was 42 feet long, with a 14 foot beam, and was yawl-rigged, with a main and mizzen mast. It appears to have been used for pleasure, and for excursions. It was still on

the Lake as late as 1909. Ex. P–8, pp. 18A and 23D; Ex. D–3, p. 142; Tr. p. 76.[2]

40. Alfred Lambourne, an artist who often took cruises on Great Salt Lake with Captain Davis, moved on to Gunnison Island in 1895 to live there, and to cultivate vineyards, in an attempt to acquire title to it under the Homestead Act. He lived on the island for 14 months, and apparently had the use, during this period of time, of a boat called "Hope." Ex. P–8, p. 18A; Ex. D–3, p. 203.

41. In 1902, the Southern Pacific Railway built a trestle across Great Salt Lake, this trestle, and the tracks on it, being called the Lucin cut-off. The construction of the trestle necessitated the use of seven tugboats and numerous small boats, and a wooden stern wheel steamer, "The Promontory," "which was built on the Lake as soon as the track laid west from Ogden reached sufficient depth of water." This steamboat may have been dismantled in about 1910. Ex. P–9, 10 and 13.

42. At the hearing in this case, counsel for the State of Utah introduced into evidence a picture of a boat called "Lucin," at anchor in San Francisco Harbor, and stated that it was "used at the Lucin cutoff." Nothing else is known about this vessel. Ex. P–8, p. 2D; Tr. p. 241.

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[2] There is a reference in the evidence to a "Cambria III." It is unlikely, however, that such a boat existed. What seems probable is that the author of the reference, knowing that the motor of the Cambria II—this being the first gasoline engine in Utah—was on display in the Utah State Capitol, assumed that the "Cambria" then on the Lake must have been a third "Cambria." It appears, however, that although the original motor on the Cambria II was replaced with a more powerful and a lighter engine as the technology improved, the boat itself was not replaced by another boat.

43. The "Augusta" was a gasoline launch used by the Southern Pacific Railway to patrol the Lucin Cutoff; it was on the Lake in 1908. Ex. P–8, p. 18A; Ex. D–3, pp. 134 and 204.

44. The "E. W. Marsh" was another boat owned by the Southern Pacific Railroad, and used for patrolling the Lucin Cutoff. Tr. p. 96.

45. A boat called "Old Salt Lake" was owned by Charles and John Backman. It seems likely that one of these is the same Mr. Backman who sometime after 1903 carried sheep over to Fremont Island for the owners of that island. Ex. D–3, p. 229; Tr. pp. 227 to 229.

46. The "Seagull" was used prior to 1903 for taking people on excursions to the islands of Great Salt Lake. Tr. p. 227.

47. An excursion boat called the "Alice Ann," which could carry eight passengers, was on the Lake in the years around 1907. Tr. p. 84.

48. John Dooley appears to have had the major interest in the Island Improvement Company which owned, subsequent to White and Sons, the ranching operation on Antelope Island. His tugboat, the "Ruth," was used to haul cattle to and from the island at least during the years 1914 to 1920. Ex. D–3, p. 236; Tr. pp. 85–87, 89, 93–96 and 100.

49. There is in the evidence an undated reference to "'Old Bob,' the Island cattle boat." No information concerning this boat is known. Ex. D–3, p. 229.

50. On June 10, 1909, the stern wheeler excursion steamer ("in good weather") "Vista," which had been operating on Great Salt Lake for two years, sank during a heavy storm. Apparently it was soon refloated, only to be hurled on the shore again during a big storm in July, 1909. The ultimate fate of this ship is not

known. Ex. P–8, pp. 23D, 34A, 34B and 34C; Tr. pp. 87 and 88.

51. The pleasure boat "Irene" was another excursion boat on the Lake at the same time as the "Vista." It was a "large cigar-shaped affair with 50 horsepower gasoline engines." Ex. P–8, pp. 24D, 34B, 34C, and 34D; Tr. p. 87.

52. On July 2, 1909, President Joseph F. Smith and members of his family took a cruise to Bird Island, and other islands in the Great Salt Lake, on the "big gasoline pleasure launch" owned by the Saltair Beach Company. Ex. P–8, p. 34A.

53. W. H. Parker's gasoline powered boat "Victory" was launched on the Lake in July, 1909. The boat was 33 feet long, with a beam of 7 feet, 4 inches. In September, 1909, it engaged in a race with several other "small gasoline launches * * * for the championship of Great Salt Lake." Ex. P–8, pp. 34C and 34D.

54. One of the boats in the September, 1909 race was the "Cozy," Blair Richardson, Captain; Mrs. Richardson at the wheel. Ex. P–8, p. 34D.

55. Another boat in the race was the "Rescue," captained by Larsen, with Will Selly at the wheel. Ex. P–8, p. 34D.

56. Another boat was "Firefly"; Captain Newman; Miss Langford at the wheel. Ex. P–8, p. 34D.

57. Another boat in the race was "Galilee"; Captain, Ralph Brown, aged 10 years; Dorothy Brown, aged 8 years, at the wheel. Ex. P–8, p. 34D.

58. In 1920, the owners of the buffalo herd on Antelope Island used a gasoline launch capable of carrying twenty people both for going to and from the mainland and the island, and for towing a cattle trailer that had a capacity of forty animals. Ex. D–3, p. 238.

59. At the same time, the owners of Antelope Island

also used a smaller craft driven by an airplane propeller. Ex. D–3, p. 238.

60. Some years prior to the death of Captain Edwin G. Brown, in 1937, one Thomas J. Holland went with him on a three day cruise of the islands of Great Salt Lake. The cruise was made with a number of people in a fleet of twelve boats. Captain Brown was the "mentor of the Salt Lake Yacht Club, a group of amateur sailors, carefully selected from business and trade and professional circles—men who had little knowledge of navigation, but a great enthusiasm for learning the rules of the sea * * *." Ex. P–8, p. 31.

61. On October 6, 1935, a Standard Oil plane crashed into the Lake, and the oil company outfitted four boats to search for it. At the completion of the operation, one of these boats was given to the Salt Lake County Sheriff's Office, where it was used "to patrol the area for boats, bathers, in case of storm, difficulty on the lake, lost people." Ex. D–3, p. 173; Tr. p. 105.

62. In the early 1940's, Leon L. Imlay, a witness at the hearing, went to Gunnison's Island in Dick Stoddard's gasoline-driven sheep barge. The purpose of the trip was to observe the guano deposits on the island. Tr. pp. 70, 72, and 102.

63. Boats capable of carrying 12 to 15 passengers operated from the Sunset Beach Resort on Great Salt Lake from 1934 to 1968. For the most part, passengers were brought to the beach by Greyline Motor tour buses, were taken on a 20 or 30 minute trip on the Lake, and then returned to their buses: all within one hour. However, parties could charter boats in the evening for longer cruises. Tr. pp. 111–122.

64. Among the boats used for excursions at the Sunset Beach Resort shortly after the Second World War

was a 28 foot Chris-Craft with an inboard motor. It was used for about 5 years. Tr. p. 113.

65. Also used by one of the excursion concessionaires (Donald Newhouse) at the Sunset Beach Resort was a 40 foot twin engine diesel, which could carry about 35 passengers. Tr. p. 113.

66. A 50 or 60 foot long boat—an LCI—is reported to have hauled guano from Hat Island or Bird Island to the Salt Lake County Boat Harbor during the years 1947 to about 1955. Tr. pp. 117 and 123.

67. In 1957, the Morrison-Knudsen Company began to construct for the Southern Pacific Railway a solid landfill causeway across the Great Salt Lake, parallel to the trestle built in 1902. The construction began early in 1957, and was completed early in 1959. Used in the construction of the causeway were six large dump barges, which were each 250 feet long, 55 feet wide, and 12 feet four inches deep at midship, port and starboard, and two feet deeper than that forward and aft. Pushing each of the barges was a tugboat of a thousand horsepower. Also used were five deck barges, which were 170 by 48 by 10 feet, two 600 horsepower twin screw tour boats, three 220 horsepower tugboats, two dredges, and a number of dredge tenders, anchor scows, anchor barges, pile driving barges, crew boats and scows. The total number of boats used was 39. When the construction work was completed, all except two of the boats used on this project were sold, and removed from the Lake. The two boats remaining on the Lake are used by the Southern Pacific Company for weekly inspections of the causeway. The Railroad has a total of four boats which it uses for these inspections. Tr. pp. 149, 152, 176, 177, 188, 199, 202.

68. In 1963, John Clawson Silver started to operate from the Sunset Beach Resort 20 to 45 minute nar-

rated tours of the Lake on his "sea monsters," that is, converted army amphibious boats. After about two years, he transferred his operation to his own beach, Silver Sands, and continues in that business today. He has a total of nine amphibious boats available for use, although only three are actually at the beach, the rest being in a warehouse. He also uses in this business a launch. Tr. 288, 289.

69. At some time in the recent past John Clawson Silver also used on the Lake a 36 foot Chriscraft boat which was primarily used to take people out on the Lake "as a promotional and goodwill ambassador" for an appliance store he formerly operated. He operated this boat for 13 years. Tr. p. 289.

70. Also in the recent past, Mr. Silver had a barge on the Lake which he used to bring in salt crystals and rock, "not to sell" but just "for decoration and pleasure." Tr. p. 289.

71. The Sanders Brine Shrimp Company, which since 1953 has harvested the small brine shrimp and their eggs from the Lake for processing and sale as tropical fish and trout food, uses three air boats in its operation. These boats are 18 feet long and six feet wide. Tr. pp. 158 and 160.

72. In the recent past, the Sanders Brine Shrimp Company used a 16 or 17 foot boat with a 50 horsepower outboard motor on it, but this boat could not get into the shallow water to which the air boats afford access. Tr. p. 158.

73. A regatta was held on the Lake in 1968, and a number of boats participated in it. Ex. P-26, P-27 and P-28; Tr. p. 211.

74. The "Gilbert," a 42 foot long, 13 ton vessel belonging to the State of Utah Geological and Mineralogical Survey, is currently used on the Lake for con-

ducting scientific investigations. Ex. P-14; Tr. pp. 139, 140, 144, 145 and 147.

75. The "Clyman," a 21 foot long Chriscraft with about an eight foot beam is also used by the Utah State Geological and Mineralogical Survey for the scientific study of Great Salt Lake. Ex. P-14; Tr. pp. 139, 145 and 147.

76. The Utah State Geological and Mineralogical Survey also uses three converted military amphibious trucks, or "ducks" in connection with its studies of the Lake. Ex. P-14; Tr. p. 139.

77. A witness at the hearing said that "Hill Air Force Base has one crash boat," but the witness did not state whether that boat now is, or ever has been, on the Lake. Tr. p. 132.

APPENDIX 3

	Name of Boat	Type of Boat	Owner or User	Date of Use	Purpose	Reference
1.		Bull Boat	Jim Bridger	1824–1825	Exploring	Ex. P-8, p. 18A; Ex. D-3, pp. 252, 254.
2.		Bull Boats	James Clyman	1826	Searching for beaver skins	Ex. P-8, p. 18A; Ex. D-3, pp. 82, 251, 254.
3.		Batteau	John B. Fremont	1843	Exploring	Ex. P-8, p. 18A; Ex. D-3, pp. 93, 252, 254.
4.	Mud Hen	Skiff in wheels	Brigham Young	1848	Exploring	Ex. P-8, p. 18A; Ex. D-3, pp. 53, 54, 180.
5.	The Sally	Yawl	Howard Stansbury.	1850	Survey	Ex. P-8, p. 18A; Ex. D-3, pp. 5, 8, 22, 180, 260.
6.		Skiff	Howard Stansbury.	1850	Survey	Ex. P-8, p. 18A; Ex. D-3, pp. 8, 22.
7.	The Timely Gull		Brigham Young	1854	Transporting cedar, salt, flagging and cattle, and pleasure excursions.	Ex. P-8, pp. 2, 18A; Ex. D-3, pp. 24, 40, 180, 182, 183, 229, 272.
8.	Deseret	Sail Boat	J. Cowdy	1855	Pleasure excursions	Ex. P-8, p. 2.
9.		Rowboat	Brigham Young	1856		Ex. D-3, pp. 38, 229.
10.	Eureka	Sloop	David L. Davis	1865	Pleasure, Surveying	Ex. P-8, pp. 20, 23B, 23D, 24, 25, 27.
11.		Sailboat	Walker Brothers	1860's	Pleasure	Ex. P-8, p. 18A; Ex. D-3, pp. 75, 102, 188, 209.
12.		Yacht	Elbert Eastam, Ben Hampton.	1867		Ex. D-3, p. 57.
13.	Star of the West	Schooner	John B. Meredith.	1867–1868	Carrying salt; Supplying Survey party.	Ex. P-8, p. 18A; Ex. D-3, pp. 56, 140, 189.
14.		"Boat"	W. D. Williams	1869		Ex. D-8, p. 20.
15.	Pioneer	Flat-bottomed Sail boat.	Patrick Connor	1867 or 1868	Carrying railroad ties	Ex. P-8, p. 23G; Ex. D-3, pp. 140, 190.
16.	Kate Conner	Steamboat	Patrick Connor	1868	Carrying railroad ties and telegraph poles.	Ex. P-8, pp. 17, 18A, 23C; Ex. D-3, pp. 60, 75, 190, 192, 245, 254.
17.	Pluribustah	Schooner	Patrick Connor	1869		Ex. P-8, p. 18B; Ex. D-3, pp. 75, 102, 190, 219.
18.		Raft of railroad ties		1868-9	Transporting railroad ties	Ex. P-8, p. 2B; Ex. D-3, p. 191
19.	City of Corinne (Name changed to General Garfield in 1875).	Steamboat		1871	Carry ore	Ex. P-8, pp. 3, 4, 5, 23C, 26C.
				1872–1881	Excursion	Ex. D-3, pp. 25, 74, 75, 88, 163, 193, 206, 207, 229, 244, 253, 254.

20. The Lady of the Lake	Steamboat	John W. Young	1874	Pleasure	Ex. P-8, p. 18A; Ex. D-3, pp. 75, 88, 209.
21. Water Witch	Yacht	Salt Lake Yacht Club.	1875–1880	Pleasure cruises	Ex. P-8, pp. 20, 23C, 23D, 26A; Ex. D-3, pp. 26, 80, 225.
22. Cambria	Catamaran	Capt. Davis	1877	Pleasure cruises	Ex. P-8, pp. 20, 21, 22, 23D; Ex. D-3, pp. 80, 135, 141, 201, 210.
23. Mary Ackle	Yacht	Silver Brothers	1877–1880	Recreation	Ex. P-8, pp. 24, 26A; Ex. D-3, p. 80.
24. Petrel	Yacht	Capt. Barratt	1882	Recreation	Ex. P-8, pp. 21, 24, 26A; Ex. D-3, p. 80.
25. America	Yacht	Capt. Hudson	1870's	Recreation	Ex. P-8, pp. 24, 26A, 26B; Ex. D-3, p. 80.
26. Maud	Yacht	Adam S. Patterson.	1880	Recreation	Ex. P-8, p. 18A; Ex. D-3, pp. 80, 135, 201.
27. Pinafore	Yacht	Salt Lake Yacht Club.	1880	Opera	Ex. P-8, p. 23D; Ex. D-3, p. 80.
28. Esther	Boat	Capt. Davis		Excursions	Ex. P-8, pp. 18A, 30.
29. Whirlwind	Steamboat	Capt. Dahl	1884, 1887	Excursions	Ex. P-8, pp. 26C, 26D; Ex. D-3, pp. 88, 207, 229.
30. Susie Riter	Steamer	Capt. Douris	1886	Excursions	Ex. P-8, p. 21; Ex. D-3, pp. 97, 207.
31. Eloise Sherman	Propeller		1889	Excursions	Ex. D-3, p. 98.
32. Lady of the Lake (Boat later sold to Judge Wenner, who changed name to "Argo".)	Sailboat	Jacob Miller	1884	Hauling sheep, etc	Ex. P-8, pp. 16A, 16B, 16C, 16D, 17, 18A; Ex. D-3, pp. 132, 141, 198, 229, 236.
33.	Sloop Schooner	Millers			Ex. P-8, p. 16A; Ex. D-3, p. 236.
34.	Schooner	Millers		Hauling salt	Ex. P-8, pp. 16D, 23C.
35.	Flat boat	White & Sons	1884	Hauling cattle, Pleasure	Ex. P-8, pp. 15, 16D, 39A; Ex. D-3, pp. 229, 233; Tr. pp. 219–229.
36.	Scow	George Fraley	1895–1903	Hauling cattle, Excursions	Ex. P-8, p. 18B; Ex. D-3, pp. 195, 196; Tr. p. 225.
37.	Sheep boat	Jake Winters		Hauling sheep	Ex. D-3, p. 220.
38. Lilly of the Lake		George Payne			Ex. D-3, p. 229.
39. Cambria II	Catamaran	David L. Davis	1891	Pleasure and Excursions	Ex. P-8, pp. 18A, 23D; Ex. D-3, p. 142; Tr. p. 76.
40. Hope		Alfred Lambourne.	1895		Ex. P-8, p. 18A; Ex. D-3, p. 203.
41. The Promontory	Steamboat	Southern Pacific Railway.	1902	Construction of Lucin cut-off.	Ex. P-9, pp. 10, 13.
42. Lucin					Ex. P-8, p. 2D; Tr. p. 241.

Name of Boat	Type of Boat	Owner or User	Date of Use	Purpose	Reference
43. Augusta	Launch	Southern Pacific Railway.	1908	Patrol the Lucin cut-off	Ex. P-8, p. 18A; Ex. D-3, pp. 134, 204.
44. E. W. Marsh		Southern Pacific Railway.		Patrol the Lucin cut-off	Tr. p. 96.
45. Old Salt Lake		Charles & John Backman.	1903	Hauling sheep	Ex. D-3, p. 229; Tr. pp. 227-229.
46. Seagull			1903	Excursions	Tr. p. 47.
47. Alice Ann			1907	Excursions	Tr. p. 84.
48. Ruth	Tugboat	John Dooley	1914-1920	Haul cattle	Ex. D-3, p. 236; Tr. pp. 85-87, 89, 93-96, 100.
49. Old Bob	Cattle boat			Haul cattle	Ex. D-3, p. 229.
50. Vista	Steamer		1909	Excursions	Ex. P-8, pp. 23D, 34A, 34B, 34C; Tr. pp. 87, 88.
51. Irene			1909	Excursions	Ex. P-8, pp. 24D, 34B, 34C, 34D; Tr. p. 87.
52.	Launch	Saltair Beach Company.	1909	Pleasure	Ex. P-8, p. 34A.
53. Victory	Launch	W. H. Parker	1909	Recreation	Ex. P-8, pp. 34C, 34D.
54. Cozy		Blair Richardson	1909	Recreation	Ex. P-8, p. 34D.
55. Rescue		Larson		Recreation	Ex. P-8, p. 34D.
56. Firefly		Capt. Newman		Recreation	Ex. P-8, p. 34D.
57. Galilee		Capt. Ralph Brown.		Recreation	Ex. P-8, p. 34D.
58.	Launch		1920		Ex. D-3, p. 238.
59.	Propeller				Ex. D-3, p. 238.
60.	12 boats	Capt. Edwin G. Brown.	1937	Recreation	Ex. P-8, p. 31.
61.		Salt Lake County Sheriff's office.	1935	Patrol lake	Ex. P-3, p. 173; Tr. p. 105.
62.	Sheep Barge	Dick Stoddard	1940's	Haul sheep	Tr. pp. 70, 72, 102.
63.	Miscellaneous boats	Sunset Beach Resort.	1934-1968	Excursions	Tr. pp. 111-122.
64.	Chris-Craft	Sunset Beach Resort.		Excursions	Tr. p. 113.
65.		Donald Newhouse.		Excursions	Tr. p. 113.

66.	LCI		1947–1955	Haul guano	Tr. pp. 117, 123.
67.	39 boats	Southern Pacific Company.	1959	Construction of causeway across Great Salt Lake.	Tr. pp. 149, 152, 176, 177, 188, 199, 202.
68.	3 Amphibious boats; 2 Launches.	John Clawson Silver.	1963–1967	Excursions	Tr. pp. 288, 289.
69.	Chriscraft	John Clawson Silver.		Publicity	Tr. p. 289.
70.	Barge	John Silver		Carry salt crystals and rock "for decoration and pleasure".	Tr. p. 289.
71.	3 Air boats	Sanders Brine Shrimp Company.	1967	Harvesting shrimp	Tr. pp. 1–8, 160.
72.	Boat	Sanders Brine Shrimp Company.		Harvesting shrimp	Tr. p. 158.
73.				Regatta	Ex. P-26, P-27, P-28; Tr. p. 211.
74. Gilbert	13-ton vessel	State of Utah Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P-14; Tr. pp. 139, 140, 144, 145, 147.
75. Clyman	Chriscraft	Utah State Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P-14; Tr. pp. 139, 145, 147.
76.	3 Amphibious trucks or "ducks".	Utah State Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P-14; Tr. p. 139.
77.	Crash boat	Hill Air Force Base.	1969	Rescue operation	Tr. p. 132.

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APPENDIX 4

The vessels listed in Appendices 2 and 3, may be placed into eight categories, depending upon the uses to which they were put. The following table lists the eight categories, and indicates, by references to the Item numbers used in Appendices 2 and 3, the categories into which the vessels fall.

I—Pleasure and Recreation

10, 11, 20, 21, 22, 23, 24, 25, 26, 27, 28, 52, 53, 54, 55, 56, 57, 60, 73.

II—Excursion Boats

8, 29, 30, 31, 39, 46, 47, 50, 51, 63, 64, 65, 68.

III—Transporting Sheep and Cattle

35, 36, 37, 45, 48, 49, 58, 62.

IV—Railroad Construction and Maintenance

41, 42, 43, 44, 67.

V—Exploration and Scientific Studies

1, 2, 3, 4, 5, 6, 74, 75, 76.

VI—Commercial Trade or Travel

7, 15, 16, 18, 19, 32, 34.

VII—Miscellaneous Uses

9, 13, 61, 66, 69, 70, 71, 72, 77.

VIII—Unknown Uses

12, 14, 17, 33, 38, 40, 59.

APPENDIX 5

Comments on and Corrections of the State of Utah's Summary of Evidence

1. Paragraph (c) of the summarization of the testimony of Zillah Walker Manning (Br. 16) is:

> c. She remembered that a harvester, requiring 12 horses to pull it, was taken to the island by boat (T. 222); and that grain raised on the island was shipped by boat, "lots of times", about twice a week in the summertime and once a month in the winter (T. 223).

The reference to this transcript shows that Mrs. Manning said two separate things, first, that she saw grain shipped on her father's boat "lots of times," (Tr. 223, line 9), and second, that her father operated the boat twice a week in the summertime, and sometimes once a month in the wintertime (Tr. 223, lines 16 and 18). But Mrs. Manning did not say that grain was shipped twice a week in the summer and once a month in the winter.

2. Paragraph (f) of the summarization of the testimony of Leon L. Imlay (Br. 18) is:

> f. Beginning in 1928, as an employee of the Royal Crystal Salt Company, he was assigned the responsibility of operating the pump station owned by that company and located near Saltair Resort, and used to pump lake brines to evaporation ponds for production of commercial salt; he was in charge of the pump station for about 11 years, or until 1939; during this period he visited the pump station one or two days each week, the pump station being located in water about 8 feet deep; during these visits

> he would see a number of boats, ranging in size from "tiny" boats to large power boats; and, in fact, he and his crew always had to use boats to operate the pump station, carrying crewmen, gasoline for the pump, fresh water and general supplies (Tr. 68–69, 73).

The summary fails to mention that from 1917 to 1939 Mr. Imlay worked for three or four different salt companies on or near the shores of Great Salt Lake, and that during all of this time all of the salt produced by these companies was sent to market by rail (Tr. 73, lines 19 to 25; Tr. 74, lines 1 to 16).

3. Paragraph (a) of the summarization of the testimony of Francis W. Kirkham (Br. 21) is:

> a. He was born in 1877, nine years before Utah's statehood; was familiar with the boating activities at Garfield Beach before statehood; was a paying passenger on the excursion boat pictured on page 12 of Exhibit P–8; and the firsts such trip that he took was before 1896 (T. 233–35).

It is noteworthy that Dr. Kirkham, who was 92 years old at the time of the hearing, and had lived in the area almost all of his life, had never gone to Great Salt Lake for any reason other than recreation.

4. Paragraph (b) of the summarization of the testimony of Phil Dern (Br. 21) contains a minor inaccuracy:

> b. Every year from 1934 to the present time Sunset Beach has operated boats for hire, usually on a concession basis whereby Sunset Beach receives a percentage of the gross income from boat rides and rentals, which percentage now approximates $10,000.00 per year (T. 112); the average boat would carry 12 to 15 passengers, although the present concessionaire (John Silver) also uses several larger amphibious "army ducks" (T. 113).

The word "present concessionaire (John Silver)" suggest that the beach is currently operating, with John Silver as a concessionaire; actually, the beach did not open in 1968 (Tr. 114, line 13) and the testimony with respect to Mr. Dern's plans to obtaining a concession at the new Antelope Island State Park (Tr. 114, lines 18 to 25) suggests that the beach had not been in use in 1969 up until and including the time of the hearing in this matter. And Mr. Silver's testimony shows that while he used to be a concessionaire at Sunset Beach, he now has his own Silver Sands Beach (Tr. 287, line 22; Tr. 288, lines 1 and 2).

5. Paragraph d of the summarization of the testimony of Harold J. Tippets (Br. 24) is:

> d. The State of Utah, Salt Lake County and Hill Air Force Base own and operate rescue craft on the lake (T. 132).

What Mr. Tippets actually said is that the State has craft which *will be* on the Lake; that county Sheriff offices *have been* involved in rescue operations on the Lake, and that Hill Air Force Base has one crash boat (Tr. 132, lines 16 to 25). But he did not say, as the summary suggests, that any of these organizations *presently have* craft on the Lake.

6. Paragraph (e)(1) of the summarization of the testimony of Thomas T. Lundee (Br. 26) is:

> e. The Great Salt Lake was particularly economical for navigation, because:
> (1) The water did not freeze in winter and the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. 177);

The summary is correct (although the reference to the Lake's not freezing is on page 172 of the transcript), and doubtless when the Lake is as low as it

was in 1957 to 1959, the higher salt concentration then existing would make the formation of ice an extremely rare phenomenon. However, in past years, when the level of the Lake has been higher, ice has been a menace to the few boats on the Lake. In Plaintiff's Exhibit 8, on page 21, appears this entry in the Journal of Captain David L. Davis:

> November, 1882. 16th to 20th was caught out in an ice flow on the great Salt Lake. The circumstances were these: The "Cambria" was blown out from her anchorage at Lake Shore by a hurricane. J. F. Hardie and myself went in search of her in the "Petrel." We found her still anchored to about 300 feet of railroad iron within 3 or 4 miles to the south end of Antelope Island. On our way out we met some ice but had no trouble getting through. We captured a muged goose, and placed him in the forepart of the boat.
>
> Coming home Hardy in "Petrel" and myself in "Cambria," we struck hard ice about three miles off Lake Shore and was stuck fast about 500 yards apart. We had no bedding nor food of any kind, and for two days I had no food or water except what ice I melted and that was so salty it made me vomit. We landed in the afternoon of Sunday at the Day farm in Kaysville having drifted some 8 or 10 miles with ice field since Thursday when we stuck. This was my worst trip on the lake.

And some time before, Christopher Layton, who had purchased the "Kate Connor" to use for transporting sheep to and from Antelope Island for the Mormon Church, had had a similar experience in that boat (Ex. D-3, p. 70):

> I had charge of the sheep and island for five years, and we had many exciting adventures and also some accidents, but no lives were lost and many are the good pleasant times we had.

> At shearingtime our girls and boys, with one of my wives to take charge of affairs, would go over to the island. Also at haying time the young folks enjoyed the pleasure of these trips. On one occasion we were bringing a load of fat sheep to Salt Lake for mutton, when the boat was caught in the floating ice, which, coming from Bear River and Jordan River, had met and formed a jam, from which we were unable to extricate ourselves for forty-eight hours. The pounding of the ice on the sides of our boat caused it to leak. We all united in calling upon the Lord in our extremity, and my wives and children, who were on shore and could see our peril, also prayed for help. A wind arose which drove the ice away, so we were enabled to reach shore, although we were obliged to go back to the island first. Then the next morning, the ice being gone, we easily crossed and were received with much rejoicing by those dear ones who had been so anxious for our safety.

Thus, ice and frozen waters are not altogether unknown to Great Salt Lake.

7. The first clause in paragraph (c) (3) of the summarization of Mr. Lundee's testimony (Tr. 27) is:

> (3) The greater buoyancy of the waters of the Great Salt Lake made navigation more economical than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171):

But, as an excerpt from other evidence in the record shows (Ex. D-3, pp. 29—30), this additional buoyancy is a mixed blessing:

> Owing to the density of the waters of the lake, boats that ordinarily would sink to the water line of the boat in fresh water, rode so high as to make them top-heavy in the salty wa-

ter. Even a moderate disturbance gives to the shore breakers prodigious power and the waters become very buoyant. When there is an unusual disturbance they become most destructive, but when a tornado hits the lake it is simply irresistible. With these facts in mind one can readily understand why boats of the lake were so easily lashed to pieces.

8. Paragraph (c) of the summarization of the testimony of Gail Sanders (Br. 29) is:

> c. The company uses three air boats 18 feet long and 6 feet wide (each capable of carrying about 1,200 pounds of adult shrimp) (T. 158-59); other boats have been used in the past, but the air boats are preferable because they can operate in any depth of water (T. 158).

The paragraph may be read as suggesting that air boats were required because the water was deep; the transcript shows that the air boats were required because the water was shallow (Tr. 158, lines 21 to 25).

9. Paragraph (c) of the summarization of the testimony of Elmer Butler (Br. 33) is:

> c. He also testified that he was familiar with the lake and was aware of the dolomite deposits near the lake which were shipped to the Geneva Plant of U.S. Steel for use as a flux, and that he worked at the dolomite mine as a boy (T. 261); that he was aware of "very valuable deposits" of dolomite sands on Stansbury Island which could only be shipped by boat during "expected" high cycles of the lake level (T. 262); that he was aware of valuable guano deposits shipped from Gunnison Island and Hat Island (T. 262); and knew that the livestock on Fremont Island could only be shipped by boat "or

helicopter" and that the livestock on Antelope Island, during high water levels, could only be shipped by boat (T. 263–64).

It is well that the word "expected" is in quotation marks, for the transcript reveals that the person who expects the Lake to rise again is the sanguine attorney for the State of Utah who examined the witness, and not the witness himself (Tr. 262, line 7).

10. The first of the summaries of the exhibits requiring comment is P–7, which is described (Br. 34) as

> P–7 Early 1871 mining map showing lake and location of General Connor's steamship routes on the lake (T. 32).

The description is accurate; what we wish to point out is that General Connor's one steamboat, the *Kate Connor,* was no longer owned by him in 1872—one year after the date of the map. (And, as we have noted, there are many allusions in the evidence to the sinking of this boat in 1871.) Whether his two other boats, the "Pioneer" and the "Pluribustah," were still on the lake in 1871, and under his control, is unknown.

11. Page 2A of Exhibit 8 (Br. 34) is described as

> Page 2–A Account of large shipments of railroad ties on the lake in 1869.

The words "shipments" should be singular; it is an account of one shipment only, and, as a matter of fact, there was only one such shipment in the history of the Lake. Ex. D–3, p. 191.

12. The summary of page 2–B of Exhibit 8 (Br. 34) is:

> Page 2–B Account of the late 1860's and early 1870's where steamboats shipped "great quantities of ore" from south end of lake to northeast part

of lake, and excursion boats capable of carrying 300 passengers.

What Mildred Mercer actually wrote in this account was, first, that "the Tooele county mines were producing great quantities of ore" and second, that "a steamboat, *City of Corinne*, had been built to haul ore and passengers from a spot near Black Rock to Corinne, across Great Salt Lake." Both of these statements are correct: great quantities of ore were produced, and the steamboat was built to carry them. But Mrs. Mercer to her credit did *not* say that the steamboat actually carried great quantities of ore, or any quantities of ore, and as we have seen from our review of the evidence, the steamboats on the Lake, although built to carry ore, were soon diverted to other uses.

13. The summarization of pages 3 to 5 of Exhibit 8 (Br. 34 and 35) is:

> Pages 3–5 Newspaper advertisements in 1875 and 1876 promoting commercial passenger service on ship "General Garfield." The advertisements also reflect the variety and volume of commercial shipments, e.g., on page 4: "On and after August 1st the regular rates on Ore, Bullion, Coke, Charcoal and Coal will be $2.15 per ton between Salt Lake City and Halfway House in lots of not less than 12,000 lbs. loaded and unloaded by the company, and $2.00 per ton when not loaded or unloaded by the company. Freight for the west will be received on weekdays only from 7 a.m. to 10 a.m. and forwarded the same day, while that received from 10 a.m. to 6 p.m. wil [sic] be forwarded the next day. For any further information concerning freight, apply to J. N. Pike, Gen'l Freight Agent, G. W. Thatcher, Gen'l Passenger Agent, H. P. Kimball, Gen'l Superintendent."

The State's summarization of the document which constitutes page 4 of Exhibit 8 is grossly misleading, as can be determined by even the most casual examination of the document itself, which is an advertisement placed by the Utah Western Railway; the rates given for the transportation of freight are rates for transportation *by train* from Salt Lake City to Halfway House, and the rates are given in terms of *car lots* which is, of course, a term having a special meaning for the freighting of goods by rails. The word "car" in the phrase "car lots" is omitted from the State of Utah's purported quotation of the advertisement.

It is clear from the advertisement appearing on page 5 of Utah's Exhibit 8 that Halfway House was not a stop on the Lake, but a stop some distance from the Lake, and that the stop on the Utah Western Railway's line where the connection with the steamer was made was at Lake Point. It should also be noted that the connection with the steamer was not to permit passengers to continue on their trip to some destination, but only to afford them the opportunity of taking an excursion on the Lake "returning in time for the train arriving at Salt Lake City at 7 p.m." It is equally clear, from the fact that no rates are quoted for freight only to Lake Point, that Lake Point in fact was not a place where freight was loaded or unloaded onto the train. Indeed, that the train carried "Ore, Bullion, Coke, Charcoal and Coal" undoubtedly explains to some extent why there was not any significant carriage of freight on the Lake.

14. Utah's characterization of page 9 of its Exhibit 8 (Br. 35) continues this misconception; the State says page 9 contains:

> Page 9 Photographs of steamship "General Garfield" and shipping dock at Halfway House near Lake Point.

To the extent that there is an identification of the place where the photographs on page 9 of Exhibit 8 were taken, the pictures are clearly shown to have been taken at Lake Point, which is, of course, where the excursionists transferred from the railroad to the boat. There is no reference anywhere in evidence which would put the site depicted in the photograph at Halfway House—Halfway House being, as page 3 of the Plaintiff's Exhibit 8 shows, the place where the train connected with the Stages for Stockton, Ophir and Dry Canyon, and where the freight was transferred to the Stages. Thereis no explanation in the State's brief of the identification of these pictures as having been taken at Halfway House; there is merely the bald assertion that these pictures show the General Garfield at Halfway House. The State has seriously erred in representing the evidence as showing the carriage by the General Garfield in 1875 of "Ore, Bullion, Coke, Charcoal and Coal."

15. Exhibit P–40 is described as a

> P–40 Contract showing present mining and removal of lime sand for flux from Stansbury Island on Great Salt Lake (T. 285).

The description is correct; the only point to be made here is that this "island" is actually, for the most part, and in fact, at the present time, a peninsula connected with the mainland (Ex. D–3, p. 171).

16. Two minor corrections in the descriptions of the Exhibits may also be noted: Exhibit P–2 (Br. 33) shows the levels of Great Salt Lake from 1850 to the present time; Exhibit D–2 (Br. 41) was not prepared by the United States Geological Survey, but by the Utah Geological and Mineralogical Survey.

APPENDIX 6

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U.S. GOVERNMENT PRINTING OFFICE: 1969

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SUPREME COURT, U. S.

FILED

OCT 26 1967

CLERK

Supreme Court of the United States

No. 31, Original.

October Term, 1967.

STATE OF UTAH,

Plaintiff,

v.

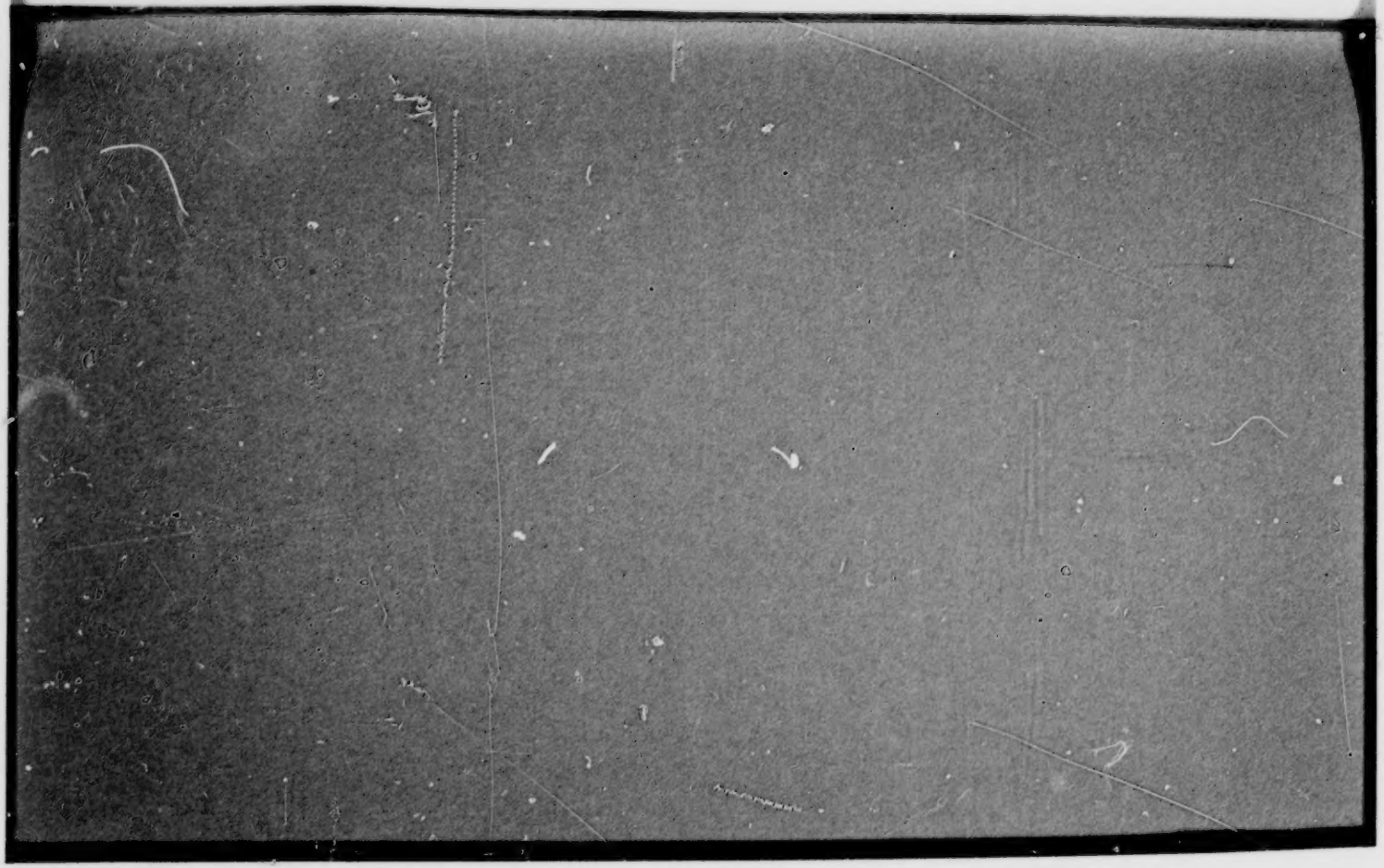
UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

International, 711 So. 20th St., Phila., Pa. 19103—Tel. LO 7-5711 Area Code 215



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IN THE

Supreme Court of the United States

No. 31, ORIGINAL.

OCTOBER TERM, 1967

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

REPORT OF SPECIAL MASTER.

To the Chief Justice and Associate Justices of the Supreme Court of the United States.

Pursuant to the authorization given me in the Per Curiam Opinion of March 3, 1969, 394 U. S. 89, 96, to proceed to the merits in this original action, your Special Master submits the following recommendations based on suggested findings of facts and conclusions of law.

I.

SUMMARY OF RECOMMENDATIONS.

1. Great Salt Lake on the date of the State of Utah's admission into the Union be found to have been navigable under the laws of the United States;

2. The State of Utah be granted a decree by the Court quieting the right, title and interest to the bed of Great Salt Lake in itself as against the United States;

3. A decree be issued by the Court declaring that the State of Utah is not required to pay the United States for the land covered by Great Salt Lake as of January 4, 1896;

4. The request of the United States for a decree quieting the right, title and interest to the bed of Great Salt Lake in itself as against the State of Utah be denied, and

5. The Court adopt the decree proposed by the Special Master or require the parties to submit a decree which in form is acceptable to them.

II.

PREFACE.

Pursuant to an Act authorizing the conveyance of certain lands, Public Law 89-441, 80 Stat. 192, as amended 80 Stat. 349, the United States has given the State of Utah a quitclaim deed conveying all title and interests which the former might have, with some exceptions not relevant here, to land within a surveyed meander line of the Great Salt Lake at a price to be determined if the Court should decide that the former owned the land conveyed; on the other hand, if the Court should conclude that the State of Utah already had title to that same land, the latter need pay nothing to the United States.

The State of Utah claims, as successor in interest to that of the United States, that it acquired title to the land which was covered by the Lake on January 4, 1896, the date of its admission into the Union, and brought the original action here involved for a decree quieting title in itself as against the United States.[1] The latter opposes this claim by asserting that title to the land did not pass to the State of Utah until the quitclaim deed, above mentioned, became effective. Should the United States prevail, this case would be at an end. On the other hand, should the State of Utah substantiate its claim of title, further proceedings will be necessary to determine other issues, one of them being whether the State lost its original title by reason of the common-law doctrine of reliction to certain portions of the former bed as the Lake became exposed after Statehood.

The foundation for the State's claim of title is that as an incident to the transfer of local sovereignty when it be-

1. Private parties were not permitted to intervene inasmuch as a stipulation entered into between the United States and Utah had so limited the issues that the presence of those private parties was neither necessary nor appropriate. 394 U. S. 89 (March 3, 1969).

came a part of the Union, it acquired whatever title to the domain as a territory possessed and not conveyed away by the United States prior to January 4, 1896 (*Shively v. Bowlby*, 1894, 152 U. S. 1, 49-50; *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 633 (1970), by reason of the "equal footing" principle. The operation of that principle, as construed in *Pollard's Lessee v. Hagen*, 44 U. S. (3 How.) 212 (1845), and subsequent decisions of this Court, requires that, in the absence of a Congressional condition to the contrary, a state, upon its admission into the Union, is to be afforded the same property interest in submerged lands as was enjoyed by the thirteen original States as successors to the rights of the British Crown. English law viewed the beds of great navigable rivers, which so happened to be tidal, as belonging to the Crown rather than to the riparian landowners. Therefore when the thirteen Colonies became independent, each one of them succeeded to the ownership of the beds of all navigable rivers and lakes located within its borders. *Martin v. Wadell*, 41 U. S. (16 Pet.) 367 (1842); *Pollard v. Hagen, supra; Shively v. Bowlby, supra; United States v. Holt State Bank*, 270 U. S. 49 (1926); *United States v. Utah*, 283 U. S. 64 (1931).

"But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State." *United States v. Oregon*, 295 U. S. 1, 14 (1935); *Massachusetts v. New York*, 271 U. S. 65, 69 (1926); *Oklahoma v. Tennessee*, 258 U. S. 574, 583, 591 (1922).

Therefore, the present issue before this Court in this case is whether Great Salt Lake was navigable in fact when the State of Utah was admitted into the Union on January 4, 1896.

The classic definition of navigable rivers and most frequently cited, appears in *The Daniel Ball*, 77 U. S. (10 Wall.) 557 (1870), a case involving the power of Congress to regu-

late under the Commerce Clause. At page 563 of the opinion, this Court stated:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ."

Each determination is to be made on its own set of facts. It is to be determined according to the law and usages recognized and applied in the Federal courts. And for purposes of determining a state's claim to title of underwater land the inquiry as to navigability is not the same in every respect, as when admiralty jurisdiction is at issue,[2] or when the question of the Congressional power to regulate under the Commerce Clause arises,[3] but is limited to the time when the state was admitted into the Union.[4]

---

2. For this purpose, the time is the present even though trade and travel have been made possible by improvement of the water course by artificial means. See e.g., *The Robert W. Parsons*, 191 U. S. 17, 26 (1903). On the subject of admiralty jurisdiction, the Clerk of the United States District Court for the District of Utah has informed me by letter that he has been unable to locate any admiralty action filed in that Court. See letter dated October 23, 1969, Appendix A.

3. In such a case, the test is more generous, and treats as subject to regulations waters which were (a) once navigable but are no longer (e.g., *Economy Light & Power Co. v. United States*, 256 U. S. 113, 123-124 (1921)); or (b) only recently have become passable (e.g., *Philadelphia Co. v. Stimson*, 223 U. S. 605, 634, 635 (1912)), or (c) are not now, never have been, but may become so by reasonable improvements (e.g., *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 409 (1940)).

4. The finest example of the application of this rule is the case of *United States v. Holt State Bank*, 270 U. S. 49 (1926), where former Mud Lake in Minnesota was held to have been navigable at statehood even though the Lake had been drained and its bed uncovered at the time evidence was taken.

Also by definition the water course is to be judged in its natural state at the time of statehood, and future artificial improvements to the water course or its feasibility, or the predictability of natural changes for the better, are not to be taken into account. Additionally, the physical condition of the water course must have been such as to accommodate at least the craft customarily used for trade and travel on water at that time. *Oklahoma v. Texas*, 258 U. S. 574 (1922). And the waterway must have a "capacity for practical and beneficial use in commerce." *Id.*, at 591, or more directly, as affording "a channel for useful commerce." *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 86 (1922). Also see, *United States v. Holt State Bank*, *supra*, at 56; *United States v. Utah*, *supra*, at 76. "It does not depend upon . . . the difficulties attending commerce. . . ." *Brewer-Elliott Oil & Gas Co. v. United States*, *supra*, at 86.

Evidence of actual useful commerce at date of Statehood is the most persuasive kind to establish navigable capacity, but such evidence is not indispensable to show that quality. It may be shown by physical characteristics demonstrating capacity, or it may be inferred from evidence of actual use at an earlier or later date.

The State of Utah has offered evidence to show physical capacity of the Lake to support navigation as of the date of Statehood. It did not stop there. To illustrate this capacity it also has shown the variety of vessels which have sailed on the Lake, both before and after the critical date, and the purposes for which they were put when the need arose.

In opposition to the State of Utah's claim, the United States maintains that from the uncontroverted facts the Lake cannot be found to be navigable because it was not an

artery of interstate commerce.[5] It argues that in the 144 or 145 years since the Lake was discovered, a thriving commerce and trade has not developed upon it, unless pleasure boating is considered as such.[6] The United States therefore argues, despite the obvious physical capacity of the Lake to support large water craft over a large area, that the State of Utah has not met its burden of proof in this case. It points out that the potential of a water course as an artery of commerce may be obviously lacking from the beginning, and that subsequent history will often be relevant in confirming that appraisal.

This argument they continue to support, in addition to other unfavorable physical characteristics of the Lake, by citing excepts from writings describing the shallow shorelands, the sailing difficulties encountered from the high brine concentration of the Lake, the desolateness and inaccessibility of its shores, and by citing population, location and distribution as confirming the useless nature of the Lake so far as commerce is concerned.

The State of Utah counters by saying that the argument of the United States is based on an erroneou interpretation of the definition of navagability. It maintains that speculation as to the relative probabilities or improbabilities of the present or future need for useful commerce is not to be indulged in, when the waterway has conceded physical capacity, and that factors such as geographical setting, accessability, population density and distribution,

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5. However the United States reads the opinions of *United States v. Utah*, 283 U. S. 64, 75 (1931) and *United States v. Oregon*, 295 U. S. 1, 14 (1935), as foreclosing this argument at this juncture and merely preserves the point "in the event it seems appropriate to urge reconsideration of those decisions when the Special Master's report is before the Honorable Court." See Brief of the United States with respect to the Navigability of the Great Salt Lake, p. 9.

6. Brief of United States with respect to the Navigability of the Great Salt Lake, p. 20.

transportation facilities, degree of industrialization and related developments in the neighborhood of the waterway may only be considered to explain limited use or non-use where that body of water has doubtful physical capacity; that if significant commercial needs arise, the Lake will be there with its physical capacity to serve as a useful highway of commerce. Nevertheless, the State of Utah has offered evidence which it believes will demonstrate that a judgment to the effect that there is little or no prospect of any future need of useful commerce on the Lake is furthest from the truth.

III.

FINDINGS OF FACT.

From the evidence presented to him and from his own observations of the Great Salt Lake and its environs, in the company of counsel for both parties, the Special Master respectfully suggests that the following findings of facts may be found:

Part I.

Findings of Fact Previous To and Contemporaneous With Statehood.

1. Great Salt Lake (the "Dead Sea of America"), appropriately named by Colonel John C. Fremont, was discovered in 1824 or 1825, over seventy years before Utah Statehood,[7] in an area which was Spanish colonial territory and later Mexican.

2. On February 7, 1848, the United States acquired this territory by treaty of peace with Mexico. 9 Stat. 922, 926, 929, 932. The locally-authorized State of Deseret existed from March 12, 1849, to the time the Territory was established.

3. On September 9, 1850, the land which was to become the State of Utah was established as the Territory of Utah. The Constitution and laws of the United States were declared to be in force in the Territory "as far as may be applicable." 9 Stat. 453.

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7. It has been written that the famous scout and fur trapper, Major James Bridger, one of the many given credit for discovering the Lake, sailed down the Bear River until he reached Bear River Bay into which the River flows, and tasted the water but immediately spit it out. Ex. P-8, p. 18A; Ex. D-3, pp. 252-254. This is understandable, as the salt concentration in the Bay was nearly thirty times greater than that of his body fluids.

4. On January 4, 1896, by Presidential Proclamation No. 9, 29 Stat. 876, pursuant to the Utah Statehood Enabling Act of June 16, 1894, 28 Stat. 107, setting forth the conditions entitling the people of the Territory to become a State, that Territory was proclaimed a State and admitted into the Union as the forty-fifth "on an equal footing with the original States." Prior to that time, starting in 1850, the United States was the owner in fee of all the land in the Territory with the exception of those portions which it had transferred to private interests by patents.

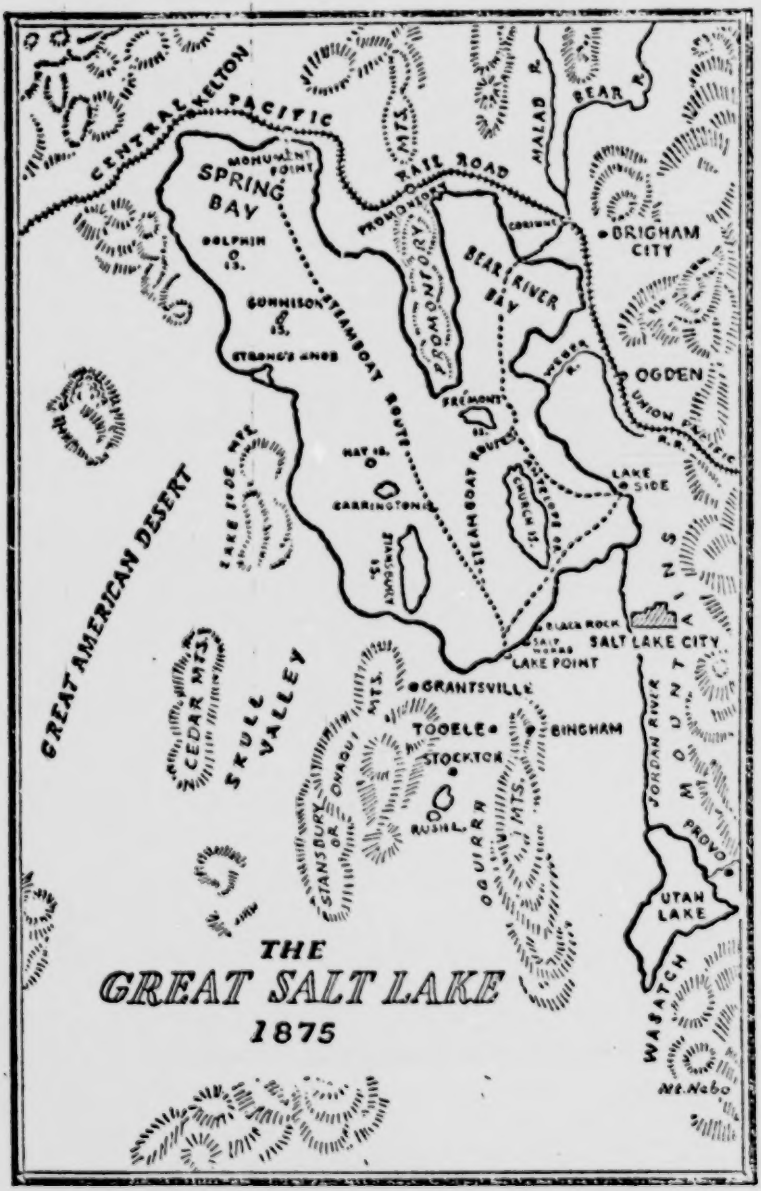
5. Great Salt Lake is a body of water entirely within the State of Utah. It lies between 40° 40′–41° 44′ north latitude[8] and 112° 10′–113° west longitude in the northern part of that State.

6. At the date of Utah Statehood, the Lake had a maximum length of approximately 77 miles, a maximum width of 32.5 miles, and a maximum depth of about 30 feet. Its shoreline was over 500 miles long, and its waters exposed an area of over 1,500 square miles to the sun. Excluding the Great Lakes, it is the largest lake in the United States. It is also one of the largest in the Western Hemisphere not interconnected with an ocean.

7. *Description of the Lake's border.* The Lake is bordered on the north for the most part by a headland thirty-three miles long, known as Promontory (Prŏm′-ŭn-tō′rĭ), which juts southwardly to almost the center of the Lake and divides the northern half into two unequal arms. The Promontory Mountains, a Lofty but narrow range, running north and south as do most of the moun-

8. Washington, D. C. lies just below 39° north latitude approximately on a line thirty miles south of the south shore of the Great Salt Lake.

[Reproduced from Exhibit D-3, p.193]



The Great Salt Lake at its commercial heyday and its highest recorded level.

tain ranges in this area, occupies a thirty mile long strip of this projecting land area. The southern shore is set with two mountain ranges standing edgewise to the Lake and their valleys. These are the Oquirrh (O Kwer), rich in copper, lead and silver, and Stansbury (formerly known as the Aqui or Onaqui) Mountains. The Tooele (Too el) Valley lies between these two ranges. To the east of the Oquirrh is the Jordon Valley and to the west of the Stansbury Mountains is Skull Valley (formerly Spring). The south edge of the Lake forms a bay area at the mouth of the Tooele Valley directly south of the Promontory tip. A small isolated rock formation piercing the water offshore midway between two small islets, a sentinel at the foot of the Oquirrh, acts as a landmark on the south shore. It is known as Black Rock. The west shore is roughly on a line sloping in a northwesterly direction at a sixty degree angle. A small peninsula with a mountain 700 to 800 feet high is situated on this shore almost directly west of the tip of the Promontory. It is a landmark and known as Strong's Knob, so named by Captain Stansbury, Strong's Knoll or Strongknob. West of this line is the sprawling Great Salt Lake Desert, formerly known as the Great American Desert, which reaches the State's western border fifty-five miles away. The Sierra Nevada, the reputed west wall of the Great Basin, is further to the west. This desert, having a gentle downward slope toward the Lake of four and one-half inches to the mile, is interspersed with several mountain clusters. Two of these, within a few miles of the shorelines, are the Terrace on the west, and Lakeside Mountains to the southwest. The irregular east shore is also roughly on a line which slopes in a northwesterly direction almost parallel to the west shoreline. It consists almost entirely of salt and mud flats. From four to eighteen miles east of this shore lie the peaks of the 8,000 feet high, above the Lake

level, Wastach (Was' sach) Mountains that form the eastern wall of the Great Basin. The southeastern segment of the shore follows a line, which starts at the mouth of Tooele Valley, sloping northeasterly at an angle of forty-five degrees and continuing until it reaches a point a few miles north of the Jordan River estuary.

8. *Shallow Shores.* The Lake has throughout its perimeter, except in a few places, unusually gentle inclining shores, having a slope of less than one foot in 1,000 feet.

9. *Islands in the Lake in 1896.* The Lake has a variety of islands, some of which can be identified as being part of mountain ranges running north and south through the Lake, whose total number and outline vary as the water level varies. A few small islands will merge with their larger neighbor, and some, which are close to the water's edge, will become part of the shore during low water stages. The mountain ranges enclosing the basin and the island heights clearly evidence water marks at different levels, one as high as 800 feet above the Lake level. When the level is high, some are partly inundated while others are entirely covered. These islands may be more easily visualized in the minds eye if the Lake is divided into quadrants.

(a) The largest by far is *Antelope Island* (earlier known as Church Island, because it was taken over by the leaders of the Church of Jesus Christ of Latter Day Saints, commonly called Mormons), named after the antelope that roamed the island. It is in the southeast quadrant. This land mass is about sixteen miles long and six miles wide at its widest point, and has an area of approximately 26,000 acres, not counting relicted land which may almost double its area. The east side is comparatively smooth, and the west is made up of serrated peaks which rise 700 feet above

water level. Its southern end lies a short distance off the southeast shore. It is surrounded on the north by a bed twelve feet deep, on the east by six feet of water, and on the west by a deposit of mud. It is an oasis in a desert of salt water and the land supports the raising of livestock. The island has been continuously inhabited since 1848. A mile west of the northern tip is a small grassless rocky islet called Egg, either for its shape or because Captain Stansbury gathered eggs there. White Rock, as the name indicates, is a huge rock jutting out of White Rock Bay located on the west side of the northern end.

(b) The third largest land mass, also located in the southeast quadrant, is *Fremont Island*,[9] named after Colonel John Charles Fremont who was first to explore the island in 1845. It lies four miles southeast of Promontory Point, five miles east of the Weber River estuary and about seven miles northwest of Antelope. It is semi-lunar in shape, six miles long, three wide, fourteen miles in circumference and has an area of about 3,000 acres. The highest point is a turreted oblong eminence called Castle Peak on the northeast portion, 800 feet above the level of the Lake. The water around it averages six feet in depth. It has the best bay in the Lake and boats can sail up to its beach without difficulty, the depth of the water being eighteen feet deep within a hundred yards of the shore. This island, although timberless, has rich grass and supports the raising of livestock.

(c) The second ranking land mass in size, located in the southwest quadrant, is *Stansbury Island*, named after

9. A Mrs. Zillah Walker Manning, born in 1891 on the Lake's east shore, called as a witness by the State of Utah, referred to this land area as Wenner's Island, because a Judge Wenner had lived there. Transcript, Vol. II, p. 226. Judge Wenner was born in Bethlehem, Pa., in 1849, died September 19, 1891, and was buried on Fremont Island.

Captain Howard Stansbury, commissioned by the Federal government to survey the Lake in 1849-50. This land mass is oval in shape, twelve miles long and four miles wide, and twenty-seven miles in circumference. It has high central rocky ridges, the highest reaching 2,445 feet above the level of the Lake. The eastern side supports the raising of livestock; the western side is arid. Valuable deposits of dolomite sands exist here. Like Antelope and Fremont, the greater part of this island was privately owned.

(d) The fourth largest land area, also in the southwest quadrant, is *Carrington Island,* named after Albert Carrington who surveyed the east shore in 1848. It is about five miles distant from Stansbury Island, almost an equal distance from the west shoreline, and twenty miles from Antelope Island. It is a circular mass eight miles in circumference, covering an area of more than a square mile and has a 600 to 700 foot high peak with a mild slope. It is indented with several open bays and sandy beaches of oolitic sand, and boats can come close to its shore, since the water is from three to six feet deep around it except the south and southwestern shores which are shoals and shallows, and which are more extensive than the island itself. A small islet, Badger Island, is just south of this island.

(e) *Hat Island,* so named because it resembles a colonial hat floating on water, is four miles north of Carrington Island. The water between these islands is "quite shoal, the deepest being only six and one-half feet." It is a rocky mass of some twenty-four acres, and its highest point rises eighty feet above the water. It has a small level beach when the level of the Lake is low. When the gulls, pelicans, herons and cormorants use this island as a nesting sanctuary, it is one of the main tourist attractions by boat.

(f) The remaining three islands are in the northwest quadrant. The largest of these is *Dolphin Island*, so named because of its shape, a rocky elevation of seventy feet and about 1,000 square yards, mainly of conglomerate rock in horizontal strata, surrounded by shallow waters. It lies twenty-two miles south of the northern edge of the Lake and a few miles off the west shore near the Terrace Mountains.

(g) Thirteen miles further south and seven miles from the west shore line lies *Gunnison Island*, named after Captain John W. Gunnison, an efficient Lieutenant in Stansbury's expedition. It is approximately 155 acres with a cliff 400 to 500 feet high, white sand beaches and surrounded by nine to twelve feet of water. *Cub Island* is immediately northeast of Gunnison. These islands, because of their safety from predatory animals, like Hat Island and Carrington, are frequented by a large number of migratory aquatic birds, and thousands of sea gulls have been known to migrate from the Pacific coast for the rearing of their broods of young here on these desolate spots. The islands are valuable for their guano deposits. Six miles south and a little west of Gunnison Island, almost directly west of the top of Promontory is a Knoll, 700 to 800 feet high, close to the west shore. It is a landmark and is known variously as Strong's Knob, the name given to it by Captain Stansbury, Strong's Knoll or Strongsknob Mountain.

(h) These islands are said to form parts of mountain ranges. The Oquirrh Mountains, Antelope, Fremont and Promontory Mountains, forming one of them. The Stansbury Mountains, and the islands of Stansbury, Carrington and Hat make up another, while Strong Knob, Cub, Gunnison are probably lined up with the Lakeside Mountains to the south. There is a ranch house at Antelope Island where the ranchers live, and some herders stay on Fremont Island, but the remaining islands are uninhabited by man.

10. The deepest section of the Lake for the greatest distance is between the Oquirrh and Stansbury Mountains chains and continuing on up into the northwest arm between Promontory and the west shore. The Bear River Bay and the east shore are shallow as are great areas along the west and southwest shore. The average depth was about 13 feet. Shallow parts of the Lake can be easily avoided by keeping boats in the deeper sections.

11. The Lake occupies the bottom portion of a large depression known as the Great Basin. It is what's left of an ancient gigantic fresh water sea known as "Lake Bonniville," which had a surface area ten times the present. The bed at its lowest level was approximately 4,170 feet above mean sea level, exceeding the height of the average Appalachian Mountain, and the water's edge was 4,201 feet 3 inches above mean sea level. The shore for the most part has a slope of less than one foot in 1,000 feet. A rise of a few feet in the water level will inundate great areas of land surrounding it, and a similar drop will leave large areas uncovered.

12. The Lake is a drainage spot for a large area. In addition to it being fed by underground streams and precipitation from the air, a number of tributary rivers flow into it. The principal ones being the Bear, Weber and Jordan Rivers. The Bear and Weber enter the Lake on the northeast. The Jordan, whose source is Utah Lake, twenty miles south, empties from that direction. The Weber and Jordan are entirely within the State of Utah, while the Bear originates in Utah but flows through two northern bordering States, Wyoming and Idaho, before reaching the Lake. The Federal government, since 1875, maintains gauging stations to measure the year-round level of the Lake and keeps records of those readings.

13. The Lake is without an overflow level lower than its rim [10] and therefore waters coming into it do not flow out. Although some water has been pumped out of the Lake by industry, there has been no artificial attempt to maintain an even level by drawing more from it. That has not been necessary because the supply of water from the outside has not been enough to offset evaporation. As a consequence the level has gradually lowered from a recorded high of 40 feet 8 inches (4,211.75 feet above mean sea level) in 1873 to 30 feet 3 inches (4,201.25 feet) at time of Statehood. In 1850, 1857 and 1860 the level of the Lake approximated that in 1896. It has been estimated that the amount of water needed to maintain the level of the Lake is 3,500,000 acre-feet per year.

14. Absent the wind, the Lake is a comparatively smooth calm body of water, being without ebb and flow of the tides and eddies. The hardly noticeable currents that exist are the result of the inflow of fresh waters from the rivers, which remain on the surface at some distance from the mouths of those rivers until they ultimately blend with the brine. From the variable blasts of the wind the smooth surface becomes ruffled and mimic waves develop in unbroken series, their size depending on the speed of the wind.[11] They sometimes reach heights of from five to eight

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10. According to Grove Karl Gilbert one must go twenty miles northwest of Preston, Idaho, to Red Rock Pass, which is about 625 feet above the level of the Lake, for a glimpse of the first overflow level to the Great Basin. At one time the pass was a thousand feet high (P-31, p. 27).

11. Concerning the waves that can be churned up by the wind, Captain Stansbury was moved to write about one of his experiences while sailing on the Lake: "The crew were all entirely unaccustomed to the water, and were no little alarmed at the heavy swell caused by the gale, which was much greater than I had anticipated, and made most of them quite sea-sick." (Ex. D-3, p. 8).

feet and break with a slow but powerful motion.[12] The topography of the bed remains relatively constant and is covered with a soft muck. There are no reefs, sandbars, rapids, floating debris or underwater obstructions.

15. The level of the Lake experienced an annual rise and fall seldom exceeding two feet in a year, the average being about 1.7 feet. The high water seasons are in the months of May and June, and the lows in October and November. Wind "tides" cause temporary variations in the level, sometimes reaching three feet and uncovering many square miles of the bed on one side while flooding many square miles on the others.[13]

16. The Lake has a high concentration of soluble solids, or salts, the residue of accumulations over the years, comparable to that of the Dead Sea. The factors of no outlet and evaporation were conducive to that condition. The concentration varies inversely with the volume of the Lake, the saturation point being around 28% by weight. It varied from 13.7% at its "highest" stage in the 1872-1874 period to 22% in 1896. In 1896 a cubic foot of the Lake weighed about 76 pounds in comparison to 62.4 pounds for an equal volume of distilled water. In other words with distilled water being unity, the Lake had a specific gravity of 1.2 or a

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12. "The waves are very heavy and roll lazily even in sev e storms." (Ex. D-3, p. 127).

13. In his report of 1852 Captain Stansbury notes: "It will be seen that the rise and fall of the water of any particular locality is dependent in great measure upon the force and direction of the wind; making a difference of nearly a foot in a very short time. This of course makes a corresponding difference in the extent of the sandflats [on the west shore], amounting in many cases to miles in width." (Ex. D-3, p. 17). And: "The water, under the influence of the northern blast, rose upon the beach crossed by the line a few days since so as to extend some 6 or 7 miles to the south of it; but this morning it had returned to its old boundaries, upon the subsidence of the gale." (Ex. P-31, p. 29).

20% greater buoyancy than that of the ocean.[14] Thus a vessel on the Lake during that period could carry a 20% greater load than on the ocean.

17. The Lake is not an attraction for the fishing enthusiast nor a source for the cravings of the seafood gourmet. At any depth of consequence it is almost free of oxygen. Fish entering from the rivers soon suffocate and become pickled. However, the Lake is not without aquatic life though the variety of venegtation and marine life is surprisingly small. "There is more life in the water than in any body of its size, fresh or salt, but the species are few. There is an *Alga* (seaweed) about the size and shape of buckshot, looking like a globule of great jelly, which abounds everywhere in countless number. Upon the *Alga* feeds a minute [brine] shrimp, from a quarter to a half-inch long which looks like a very small minnow with a feathery tail."[15] The globular sea-weed, of which there are several kind, float in ragged mats on the surface, sometimes giving it a red tinge. They also support the larvae of two species of flys in their grub stage. The Lake will not support the raising of other crustacea or oysters or clams. Wood piling and other wood products placed under water are "preserved" or "embalmed", and not subject to the attack of teredos (shipworms), barnacles, fungi, and other destructive agents, for they simply do not exist in the brine.

18. The shores, with an occasional sector of grass where springs come to the surface, were as flat, barren, bleak and treeless in 1896 as when Captain Stansbury surveyed the Lake in 1850. "There are no trees on the borders

14. It was inevitable that a sloop sailing upon the Great Salt Lake would be named Eureka! (See Ex. P-8, pp. 20, 23B, 24, 25, 27.)

15. Ex. D-3, p. 94.

of the lake, nor on any of the adjacent plains. It is necessary to ascend almost to the summit of the surrounding mountains to procure firewood, composed of green trees, some maple, willow, poplar and oak. Nothing is to be seen near the shore but a few withered plants, ..."[16] Except for an area at the southeastern shore near the base of the Oquirrh Mountains, where the beaches are located, the Lake is surrounded by stretches of salt flats, marshes or bogs, some of which are in places several miles in width.[17]

19. Settlement in the vicinity of the Lake began about 1847, some twenty-three years after the Lake's discovery, when the Mormon pioneers, attracted by Fremont's report, arrived in the Valley. Ever since 1850, there have been sizable settlements several miles from the Lake. Salt Lake City to the southeast was the first and largest. Ogden and Brigham City on the east are next in size in that order. The mining and smelting town of Grantsville, Tooele and Stockton were established in the Tooele Valley.

20. *Railroads:* It was on the Promontory that the famous "Golden Spike" was driven home on May 10, 1869, as the last act in the completion of the first continental railroad, the joining of the Central Pacific and the Union Pacific railroads. This railroad, after having reached Ogden, continued in a northwesterly direction, crossed the Bear River and skirted the northern shore of the Lake on its way to the Pacific coast. The accomplishment of this railroad feat ushered in the building of new railroads or the extending of railway lines into the Lake's environs. In

16. Jules Remy, *A Journey to Great Salt Lake City*, Vol. I, p. 181 (Ex. D-3, p. 67).

17. "Almost everywhere land and water were divided by mud flats, across which they were forever dragging their boats and packing their baggage." *The Resources and Attractions of Utah* (1888), p. 62 (Ex. D-3, p. 102).

1870 the Utah Central connected Ogden with Salt Lake City. And by 1878 the Salt Lake and Pioche Railroad (Later became Utah Western Railway, and then Utah and Nevada) extended its line westward to Lake Point, and the mining towns of Tooele, Stockton and Tintic, in Utah, and then on to Pioche, Nevada, by way of the Sevier Valley. The Denver & Rio Grande Western Railroad reached Ogden in 1883, and then Lake Side in 1886. Salt Lake City and Saltair resort were connected in 1893 by the Salt Lake, Garfield and Western Railroad.

21. *Summer Resorts on the Lake at Time of Statehood:* There were a number of resorts on the east and southeast shores of the Lake visited annually by over a hundred thousand people.[18] They were important here because they maintained the sole docking facilities, built upon piling extending into the water, on the Lake. There was *Lake Side* (1870) on the east shore one mile below Farmington near a main railroad line, Utah Central, connecting Ogden and Salt Lake City in 1869. A little north of this resort, and west of Syracuse junction, was *Lake Park* (1886), with its long covered pier running into the water, built and operated by the Denver & Rio Grande Western Railroad. On the southeast shore at the base of the Oquirrh Mountains, 22 miles from Salt Lake City, was *Lake Point* (1870) near *Black Rock*. During the existence of this resort it was known as Steamboat Landing, Steamboat Point, Clinton Landing (named after Dr. Jeter Fieldy Clinton, its founder), Short Branch (1876) and Clinton's Beach. The overland stagecoach stopped there. Five years after its beginning, the resort was serviced by the Salt Lake &

18. The bathing season began about June 1 and continued to October 15. Temperature of the water started from 60° and increased until August when it went up to 85° where it remained for some weeks. (See Ex. D-3, p. 94.)

Pioche Railroad, which extended its line to that resort, then farther south to the mining towns of Tooele, Stockton and Tintic, and on to Pioche, Nexada, by way of the Sevier Valley. The railroad became known as the Utah Western Railroad, and still later, the Utah and Nevada. Also a short distance and west of Black Rock and a little east of Lake Point was *Garfield Beach* (1878), named after President James A. Garfield. At first it was called Garfield Landing. In early 1887 the Utah and Nevada took over the resort and added a pavilion of 135 by 65 feet, and a steamboat landing over 400 feet from shore. It was the only resort on the Lake "having a clean, sandy beach, free from mud, rocks and offensive vegetable matter." (Ex. D. 3, p. 207.) At *Saltair* (1893), also on the southeast shore, 17 miles from Salt Lake City, a pile-supported track carried the Salt Lake, Garfield & Western Railroad 4,000 feet out into the Lake. At the end of this piling was a large two-story pavilion, containing for that period an immense ballroom. During the summer season over 100,000 people would visit these resorts. Each of the resorts included boating, as well as bathing, as part of its program. Some of them featured excussion trips into the Lake. For example, the steamer "City of Corinne", in June of 1872, sailed from Lake Side, where she was based until renamed the "General Garfield", to Lake Point, and from there to Monument Point at the north edge of the Lake. This same ship carried ore from various points, including Lake Point, on the shore of the Lake to the smelter at the City of Corinne, 20 miles up the Bear River.

22. The principal industries in the Lake and its environs at time of Statehood were salt extraction, raising and transportation of livestock (horses, cattle, sheep and some buffalo), mining and smelting, operating of summer

resorts which featured bathing and pleasure boating and excursions on the Lake.

23. Although there is evidence of water craft having traveled on the Lake before [19] and after January 4, 1896, there is none at time of Statehood.

24. And even though there is evidence that vessels sailed from the Bear River to the Lake, and up the Jordan River from the Lake, there is no evidence upon which to base a finding that vessels could travel on water between the Lake and its affluents to any place outside of the State of Utah since 1824.

25. *Factors favorable to travel and hauling by water craft on the Lake and in its natural condition at time of Statehood.*

(a) Level of Lake remained relatively constant;

(b) Depths of 5 to 30 feet over a wide area;

(c) Profile of bed did not change abruptly;

(d) No underwater obstructions or floating obstacles;

(e) Calm surface and lack of tides and strong currents;

(f) Availability of Lake's surface for sailing of water craft not intermittent or infrequent, but regular and dependable; and

(g) Salt concentration increased buoyancy of the water and lowered its freezing point which was a deterrent to the formation of thick ice on the surface.

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19. A total of forty boats were identified as having been on the waters of the Great Salt Lake from 1824 until the admission of the State of Utah into the Union.

26. *Natural drawbacks to travel and hauling by water craft at time of statehood.*

(a) *Shallow shores.* The gradual shelving of the basin and the softness of the shore surface make it unusually difficult to get boats from dry land into floatable water.[20] To reach water five feet deep, one must move out a mile or more from the water's edge. Greater sailing stability in deep water and safety of craft are sacrificed for shallowness of draft and flatness of bottom despite the twenty percent "bonus" in buoyancy of the Lake so that the vessel may get closer to shore without running aground.[21]

(b) *Absence of natural harbors.* This condition is not unique. There are very few natural harbors in the world, and most harbors need some type of artificial improvement to make them usable or commercially profitable for loading and unloading of vessels, such as breakwaters, dredging, or building of piers of sufficient length to reach deep water.

(c) *Absence of protective harbors.* Naturally sheltered inlets, bays and havens do not exist along the shores of the Lake. Boats on the Lake, unless they happened to be on the leeward side of one of the large islands or near one of the resorts, were at the mercy of the winds and waves.

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20. This condition caused Captain Howard Stansbury to remark of his experience during the survey of the Lake in 1850: "The loss of the skiff is deeply felt—the nature of the shore being such that large boats, when loaded, cannot, in many places, approach within three miles of the land, and the lighter vessel is therefore indispensable." Ex. D-3, p. 19.

21. "Owing to the shallowness of the water, from the Cambria's time [1870] to the present [?], it has been generally recognized by yachtmen that keel boats are unsuited to Great Salt Lake, and shallow draft boats have come to dominate the lake." The "Cambria" is said "to have been the first boat of the English model of catamaran built in America. She was 20 feet long with a 10-foot beam, and with 5 feet of space between the two slims, pointed boats which formed her divided hull." Ex. D-3, p. 210.

And unless someone stood watch, the only sure way of protecting a boat from the acts of the curious, the prowler and the vandal, was to remove the boat from the Lake. The necessity of having to retract the boats and towing them away has a tendency to limit the size of boats used on the Lake.

(d) *Natural landings.* Convenient locations for launching and landing of boats are not to be found on the Lake. Of course there were some places which were superior to others. These are few, however, and are found on the beaches at the foot of the Oquirrh Mountains and a bay area on the western shore of the Promontory about seven miles north of the tip, and they were not readily accessible to the settled area east and southeast of the Lake.

(e) *No outlets.* For this reason the Lake has been infrequently used as an artery by water or as a link in interstate travel or commerce.

(f) *Salt spray.* Storms break out over the Lake with little advanced warning.[22] This adverse wheather condition and the swells it whips up are not in themselves too formidable a deterrent to sailing upon the water. It is the spray from the waves that is distasteful. When it drys, the spray, by reason of its high salt concentration, leaves a white powderly coating on boat, clothing, and skin.[23]

(g) *Sodium sulphate precipitation and encrustation.* The maximum solubility point of certain salts is dependent

22. See, for example, Ex. P-8, p. 34-B (July 5, 1909).

23. Around 1902, the botanist and geologist, Marcus E. Jones, wrote: "Though the air is very invigorating and healthful on account of the salt spray, there is very little sailing upon the lake because of the unpleasant effect of the salt which crystallizes upon the body and clothes in thick scales from every drop of water which strikes them. Salt water soon destroys leather and rubber and causes disagreeable cracks in the skin, when it is not washed off by fresh water." Ex. D-3, p .127.

upon the volume and temperature of the Lake and other solids in solution. When the volume and temperature go below certain readings, some salts will precipitate from the solution. Sodium sulphate, found in solution in the Lake, is one of these. As adequately explained in *The Mountain Empire Utah* (1940), p. 78: Sodium sulphate, 6.22% of the soluble solids, "is insoluble in a strong brine at low temperature, and every winter it separates spontaneously from the water as soon as a critical point of temperature—near 32 degrees F. or 0 degrees C.—is reached. This material is known commercially as glauber salt [named after the chemist Johann Rudolph Glauber] and mineralogically as mirabilite. As it crystallizes from the brine at winter temperature, the lake is rendered opolescent, and the sulphate settles on the lake bed, or near shore and is thrown up on the ocean brink. As the temperature of the water rises, the glauber salt is taken into solution [again] . . . . The abundance of deposit each year is surprising. Indeed, during the cold months a visitor to the lake shore has to wade through the glauber salt accumulations, sinking at each step to the knees." (See Ex. D-3, p. 146. Also see Ex. P-8, p. 18A.)

27. *Conditions in the Lake's environs.*

(a) *Accessability to the shores by land:* The Lake has desolate shores. It is ringed with great stretches of salt flats, salt marshes and bogs which made difficult an approach to its shores by foot, horseback or horsedrawn vehicle. The building of railroads to the summer resorts decreased this problem at those points. But even these approaches could not always be depended upon because of the caprice of the water's edge.

(b) *Lack of nearby trees:* The absence of handy suitable lumber on the shores restricted boat building to those

able to command labor to ascend the mountain canyons to retrieve the trees, the best being none too good, necessary for such purposes,[24] or who could afford the cost of transporting a vessel by rail from the boat building centers.

28. The population centers of the Lake's environs were in the area between the east and southwest shore and the Wasatch Mountain Range, and include such cities as Salt Lake City, the largest, Ogden and Brigham City. In the Tooele Valley to the south were the towns of Gransville, Tooele and Stockton. When the smelter of Corinne became inaccessible by boat from the Lake, a smelter was built at Grantsville, at the base of the Stansbury Mountains. None of these places were within ten miles of the Lake's shore.

29. *Meander line:* A complete official survey of the Lake's "meander line" has never been made. A partial one was accomplished in 1855, with many gaps, and some parts, particularly on the west side in Box Elder County, were omitted. This incomplete survey line has been "accepted" by the Surveyor General, and has been plotted on the official records of the officers of the county recorders in the counties located along the Lake.

30. Congress has never declared by special act that the Lake is non-navigable.

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24. On this subject, Captain Stansbury reported: "During the winter, a large boat was built for the survey of Salt Lake. This was an achievement of no little difficulty, as almost every stick of timber used in the construction had to be procured from the canons of the mountains, piece by piece; and the planking, although the best material the country afforded, was so 'shaky' and liable to split and crack, that it was totally unfit for the purpose." (Ex. D-3, p. 5). And in another part of his report, the eloquent Captain tells us of the time and labor needed to procure the trees and the amount "must be experienced before it can be appreciated." (*Ibid.*, at 4).

31. *Navigability:* The Great Salt Lake, as of January 4, 1896, was navigable within the meaning given to that word by the Federal courts for the purpose of determining a state's title to the bed of a body of water at statehood. This finding is not based in whole or in part on the doctrine of judicial notice [25] or the fact that the Lake has been meandered, but on the following:

(a) On January 4, 1896, the Lake was 30.2 feet deep or 4200.2 feet above sea level.

(b) As of that date, the Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over which trade and travel was or might be conducted in the customary modes of travel on water at that time.

(c) If the need should have arisen on January 4, 1896, the Lake could have floated and afforded passage to large boats, barges and similar craft currently in general use on inland navigable bodies of water in the United States.

(d) The areas of the Lake which had a depth sufficient for the purposes in sub-paragraphs (b) and (c) above were not narrow or short channels, but were several miles wide, extending substantially through the length and width of the Lake, and covered an area of more than 1,000 square miles. A vessel could have traveled almost in a straight line from Monument Point located on the northwestern tip of the Lake to a point, where Silver Sand Beach is now located, at the southern edge.

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25. In this regard the Supreme Court of Utah has taken judicial notice that Great Salt Lake is navigable. See *Robinson v. Thomas*, 75 Utah 446, 286 Pac. 625 (1930); *Deseret Livestock Co. v. State of Utah*, 110 Utah 239, 191 P. 2d 401 (1946).

Part II.

Preliminary Statement.

While the State of Utah places its main reliance on the navigability of the Lake at the time of its admission on January 4, 1896, which the Special Master sets forth in Findings of Facts (Part I), nevertheless the Government maintains from the testimony adduced at the hearings that the Lake's susceptibility for use as a highway of trade and commerce, in the light of events since the State's admission into Statehood, is too conjectural and hypothetical to establish its navigability.

In *United States v. Utah, supra*, 283 U. S. at 83, the Court stated, with regard to the consideration of future commerce, ". . . [A]s the title of a State depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. . . .

"The question remains one of fact as to capacity of the rivers in their ordinary condition to meet the needs of commerce as they may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. . . ."

It is apparent, with this quotation in mind, that the State of Utah has offered a great deal of testimony and many exhibits to forestall a finding for which the Government contends.

The Special Master here sets forth suggested Findings of Facts as developed by the testimony taken at the hearings, some favorable to the United States and some favorable to the State of Utah, in the same manner as the Findings of Facts (Part I) are here set forth, that is solely with the idea of putting in proper focus—and discarding the irrelevant—those facts which are pertinent to the issue. Some have a direct impact, some in the peripheral area,

with probably less pertinency, but all, in the Special Master's opinion, worthy of consideration.

There have been drawbacks and obstacles to commerce and trade by water craft on the Lake added to those that existed in 1896. However, a few of them have been minimized somewhat today. The density of the population centers within miles of the Lake, near which airports have sprung up, has increased; accessibility to its shores has been made easier; major highways have brought the motor vehicle within reach of the water's edge near the resorts; pleasure boats of all types for sailing on the Lake may now be ordered out of a catalog; and the versatile DUKW ("duck"), a former military amphibious truck, has decreased the effort needed to launch a boat and thereafter retract it by means of a trailer; gasoline or diesel engines have been in this era within reach of most boating fans and the radio can give advance warning of storms and summon aid to those in distress on the Lake. Industry has taken a new look at the treasures locked in the Lake, in its bed and environs, with an eye to profiting from them. Nevertheless the whole picture has not changed greatly.

Findings of Fact Subsequent to Statehood.

32. Five Counties in the State of Utah border on the Lake. They are Salt Lake on the southeast, Davis and Weber on the east, Box Elder on the north and northwest, and Tooele on the west and south.

33. *Level of the Lake:* At time of trial in May of 1969, the level of the Lake was 26 feet 3 inches (4,197.25 feet above mean sea level), a drop of 4 feet from the level at Statehood, and a drop of 14 feet 5 inches from the recorded high of 40 feet 8 inches (4,211.75 feet) in 1873. The low

point during the 119 years of its recorded elevation readings was reached in the latter part of 1963, when the water gauge read 20 feet 6 inches (4,191.5 feet). Since Statehood, the high was 34 feet (4,205 feet) in 1923, and although the level fluctuated within the years, the general trend has been downward (See Appendix B). As the level of the Lake decreases, the size and shape changes noticeably in most places. However, the deepest parts of the Lake have never been less than 20 feet, which depth is enough to float the largest vessel fully loaded that was ever used on the Lake.

34. *Climatic conditions:* In the seventy-three years since Statehood the highest temperature reading in the vicinity of the Lake was 107°F. in 1960, and the low was —18° F. in 1963. The highest yearly temperature has gone over the 100° mark 33 times and the lowest yearly temperature has fallen below zero 29 times. The average high is 101.08°F., and the average low, 1.47°F. The highest rain fall was 21.69 inches in 1922, and the lowest was 8.99 inches in 1966.[26] The average is 16 inches. Prevailing winds are westerly. The Lake will not begin to freeze, on the average, until its temperature drops to 18°F. above zero, a point seldom reached by the brine and even then only a scum of ice will form on the surface. There has been evidence of boats being caught in floating ice jams (Ex. D-3, p. 70), and being stuck fast (Ex. P-8, p. 21). These instances have been close to the eastern shore, near the estuaries of incoming streams, where the fresh water will float, especially in the cold season, above the brine for great distances, and where extensive cakes of ice sometimes drift out onto the Lake. (Ex. D-3, p. 152).

35. *Salt precipitation and encrustation:* When the Lake recedes near its low points, as it did in 1935, 1940 and 1960-

26. See Appendix C.

1967, the brine concentration becomes so great that precipitation of sodium chloride begins. It collects on objects in the water, including boats, and ofttimes interferes with moving parts such as the propeller or steering gear. "It is a phenomenon boatmen do not regard with extreme pleasure, for it makes anchoring difficult, slows boats as barnacles would and seals in centerboards. Objects placed in the Lake at such times clothe themselves in a coat of [beautiful white hard cubic] crystalline salt. . . ." (Ex. D-3, p. 211).

36. *Railroads and major highways near the Lake subsequent to 1896:*

(a) *Lucin Cutoff:* In 1902-04, the Southern Pacific Company built a railroad cutoff (shortcut) across the Lake, known as the Lucin Cutoff, dividing it into two northern sectors and one southern half. It starts at a point on the east shore directly west of Ogden and a mile north of the Ogden Bay Bird Refuge and cuts across the mouth of Bear River Bay in a slightly southeasterly direction in a straight line eight and one-half miles long until it reaches Promontory Point on the southeastern tip of the Promontory. Then it circles the tip of that land projection for a distance of about five miles until it reaches a point named Saline on the southwestern shore. From there it cuts straight across the neck of the northwestern arm of the Lake in a westerly direction for 20 miles until it reaches the west shore at Lakeside, at the base of the Lakeside Mountains, and a few miles south of Strong's Knob. The portion of the cutoff which crosses the mouth of Bear River Bay is rock-filed except for a 600 foot long trestle in the middle. The western sector consists of four miles of rock fill, then eleven to twelve miles of trestle, followed by four miles of rock fill. Its construction necessitated the use of 57,000 wooden piles 16 to 129 feet long, the use of seven tug boats, nine gasoline

launches, each capable of carrying from 15 to 35 persons, numerous small boats, and a wooden sternwheel steamer named "The Promontory", built on the Lake for that purpose. Depts of from 0 to 37 feet were encountered. This portion of track shortened the distance by almost 45 miles, eliminated most of the curves and steep grades on the Promontory, and cut off more than two hours of travel time to the Pacific Coast for the trains.

(b) In 1906-1908 the Western Pacific Railroad laid its tracks south of the Lake and across the Great Salt Lake Desert on the way to San Francisco. It can thus be seen that the railroads had somewhat of an effect on present and future capabilities of the Lake.

(c) *Railroad causeway:* Between the early part of 1957 and the first quarter of 1959, the Southern Pacific Company built a solid tapered causeway of rock and gravel across the Lake north of and parallel to the trestle portion of the Lucin Cutoff. It took approximately two years to build at a cost of $49,000,000. The causeway which was six hundred feet wide at its underwater base required 42,000,000 cubic yards of fill weighing 70,000,000 tons. Over ninety percent of the fill was carried by barges, the rest by rail car and truck. Since there were no nearby harbors, the railway company carved one out by dredging at Little Valley, a few miles northwest of Promontory Point. The entire construction required 600 men and 39 water craft. The boats alone cost $7,000,000. Construction went on day and night, six and sometimes seven days a week, in all seasons over the period of two years.

(d) Highways were constructed several miles from the east shore and connecting Brigham City with Ogden and the latter with Salt Lake City. In addition, highway Route U. S. 40 was extended west from Salt Lake City to a

point northwest of Saltair, then it follows the southeast shore of the Lake past the resorts, skirts the base of the Oquirrh Mountains, then southwest to Grantsville, and then goes northwest past the northern end of the Stansbury Mountain range.

37. *Summer resorts:* Today there are three resorts along the shores of the Lake: *Black Rock Beach, Sunset Beach* and *Silver Sands Beach.* Their main season is between Memorial and Labor Days. In 1904, the pavilion, pier and old "General Garfield" at Garfield Beach caught fire and were burned to the ground. Lake Park and Lake Side on the east shore were left in a sea of mud by the receding waters and have been abandoned. The pier at Saltair was extended sometime between 1914 and 1919. After a fire swept that resort in 1925, leaving only the piling, it was rebuilt. A year later the level of the Lake began to drop, and Saltair was "subjected to the humiliation of being left high and dry on its pilings"[27] miles from the water's edge. In 1933 *Black Rock Beach* was rebuilt. *Sunset Beach,* a 3½ acre tract lying immediately east of "New" Black Rock Beach, comprising a rocky island called Fritch Island, opened in July of 1934. *Silver Sands Beach* is a resort having a beach 2,000 feet long and 300 feet wide and a small breakwater. The shore in front has a slope of one to sixteen and the water is fifteen to twenty feet deep before the breakwater. These spots have the only good beaches on the entire shore of the Lake and were convenient for beach goers with automobiles. They also have the deepest channel coming to the shoreline of any place of the Lake.

38. *Boating and the resorts:* As long as their pier facilities and boat ramps remained over water, pleasure

27. Ex. D-3, p. 208.

boating and boating concessions were always a part of the business at the summer resorts. During its time, *Saltair*, above mentioned, had the best pier and collected fees from private owners of boats docking at its facilities. Exclusive of an occasional shipment of livestock from Antelope Island, the pier was used by boats mainly for pleasure. Excursion trips originated there, and some of these went to Hat or Bird Island, some 25 to 30 miles away. The size of boats involved ranged from rowboats to boats holding at least 50 people. Every year from 1934 to 1967 *Sunset Beach* has operated boats for hire, usually on a concession basis whereby the Beach operator received ten percent of the gross income from boat rides and rentals, which percentage rose to approximately $1,000 a year. The average boat used would carry from 12 to 15 passengers. In 1968, the County took over the resort. *Silver Sands Beach* is used as a place for commercial boat rides and sailboat launchings. Starting in 1963 the operator of this beach conducted narrated boating tours, lasting 20 to 45 minutes per trip, which proved to be popular, at a price of one dollar for adults and fifty cents for children. And since that time the operator's gross income has increased from $8,000 to $30,000 per year from boat passengers. For this purpose he had available 8 amphibious boats or converted army DUKW's and a launch having a capacity of from 30 to 35 people at one time. For most of its daylight boat passengers, this resort depended on the Greyline Bus Tours that stopped there with tourists. In the evenings, after the bus tours ceased, special parties would be taken any place they wanted to go on the Lake, depending on the amount of money they were willing to spend. On various occasions during the summer months, as many as 75 to 100 boats could be seen on the Lake at one time.

39. *Artificial harbors:*

(a) *Salt Lake County Boat Harbor:* In 1929, as the level of the Lake rose, the Great Salt Lake Yacht Club was organized. When incorporated in 1932, it opened a clubhouse beneath the south pier at Saltair. However, as stated in Exhibit D-3, p. 211: "The facilities at Saltair became increasingly less satisfactory as the lake shrank upon itself. It was difficult to reach the boats, for the increasing shallowness of the water necessitated anchoring farther and farther out from the pavilion. And even when the water was deep enough to allow the boats to come to the pier, there was no protection from waves and storms.

"The need clearly was for a harbor of some kind, and the yacht club began groping toward plans for building an encirclement of crib work at Saltair . . . . [A]ll plans were overturned by the swiftness with which the lake began sinking, the brine concentration became so great that precipitation of sodium chloride began. It collected on the boats moored near Saltair and substantially added to the difficulties of the club members.

"It was noticed that the water in the vicinity of Garfield and Black Rock did not precipitate salt on the beach because of a small inflow of fresh water from springs along the lake shore. Though the inflow was not great, it was sufficient to prevent salt precipitation over a two mile stretch of beach . . . . A site accordingly was chosen about a mile east of Fritch Island [the Sunset Beach location]."

In 1939, with the cooperative efforts of Salt Lake County, and the work relief administration of the Federal Government, this harbor was built. It is located a mile or so east of Sunset Beach, and 17.8 miles from Salt Lake City on Route U. S. 40. It consists of a solid "T" shaped breakwater with boat shelters along its side in a small dredged

channel. (See Ex. P-11.) The stem of the "T" connects with the highway and permits the passage of automobiles on its top surface. It accommodated up to about 50 boats at one time, including those of the County police. In 1942 from 75 to 100 boats, ranging from rowboats to large cabin cruisers, were using the harbor. However, "[t]here was insufficient space at the harbor for all who desired to operate boats on the lake, nor were the facilities adequate." (Ex. D-3, p. 211.) At time of trial the harbor and its facilities were not in the best of condition and sedimentation in the channel was causing a maintenance problem.

(b) *Little Valley Harbor:* This harbor is located on the west shore of the Promontory, a few miles north of Promontory Point. It was 1,500 feet long and 400 feet wide with a 2½ mile long channel to the deep part of the Lake. The Southern Pacific Railroad excavated this harbor in 1957, with floating dredges mainly to load barges with land fill for use in the construction of the solid causeway across the northwest arm of the Lake. The harbor was not difficult to dredge as the bed consisted of muck and clay with some scattered rock content. Presently the harbor is not in good condition and the entrance channel is also narrowing from sedimentation. (See Ex. P-29.)

40. *Bird Refuges on the shore of the Lake:* The shores of the Lake and some of its islands have long been the habitat, nesting ground and stopping place for a large number of water fowl and marsh related birds. This area is an important link in the Canadian-Mexico migratory bird route. As noted in Ex. P-31, p. 53-54: "As the pioneers expanded their agricultural operation in the valley and began to turn water from natural streams into their farmlands, marshes supporting the majority of the area's water fowl population began to dwindle. Tracts of surveyed land in the Bear

River area which were valuable for waterfowl management purposes were withdrawn from entry by the Federal Government in 1920. In 1923 construction was initiated in the State's public shooting ground utilizing part of the area withdrawn by the Government and private lands purchased for that specific purpose." Started in 1928 and completed in 1932, the Government established the 65,000 acre *Bear River Bird Refuge*, one of the finest in the world, upon the vast marsh lands of the Bear River delta on the east shore, west of Brigham City. Forty percent of this land was below the meander line, and the United States set aside an equal area of the refuge for free public hunting in season. The idea caught on and within a space of five years the State established three more bird refuges: *Locomotive Springs* in 1931, northwest of Monument Point; *Farmington Bay* in 1935, on the east shore, eight miles north of Salt Lake City; and *Ogden Bay* in 1937, also on the east shore, nine miles west of Ogden, on the Weber River delta.[28] In the 1950's, the United States paid the State $20,264.25 for the purchase from it of relicted land as part of the Weber Basin project. In 1964, the 12,000 acre *Willard Bay Waterfowl Management* area, just south of the Bear River Bird Refuge, was established with funds provided by the United States, in mitigation of loss of water fowl habitat caused by the construction of the Willard Reservoir. During peak use periods these marshes play host to over a million ducks. In addition the natural areas provide for 750,000 more. Waterfowl and marsh animal hunting is available to the public in season. Annually over 169,000 ducks and 3,000 geese (42% of the State's total) and 30,00 muskrats are harvested here. These wild life and bird sanctuaries presently and in the future offer a great attraction to the general public to travel on the Lake for viewing.

28. See Behle, *The Bird Life of Great Salt Lake* (1958), pp. 164-192 (Ex. P-30; Ex. P-1).

41. The United States spent at the request of the State, or has reimbursed the State, a total of $1,156,374.25 under the Pittman-Robinson Act. (Wildlife Conservation Act, 16 U. S. C. (1964) § 669 et seq.)

42. The setting aside by the United States of a portion of the Bear River Bird Refuge for free public hunting, and its payment to the State for the purchase of relicted land to be used as part of the Weber Basin project as well as the reimbursements under the Pittman-Robinson Act are relied upon by the State of Utah as a basis for its assertion that the United States should be estopped from denying Utah's title in this action.

43. The State of Utah has not shown any detriment or harm from any of the above acts of the United States.

44. *Antelope Island causeways:* This island has been connected with the shores of the Lake by two solid land-filled causeways. One of them traverses the shallow gap, which could be forded when the level of the Lake was low, between the southern tip of the island and the southeast shore. Construction on the other has been piecemeal, starting in 1954, and bridges the seven and one-half miles between the northeastern part of the island and the town of Syracuse on the eastern shore. This causeway has a surface forty-two feet wide, and its interspersed with culverts, permitting the passage of small boats when the level of the Lake is low.

45. *Harvesting of brine shrimp and brine shrimp eggs:* Since 1953, the Saunders Brine Shrimp Company has been harvesting brine shrimp and brine-shrimp eggs from various shallow sections of the Lake to be used as food for fish, especially tropical fish. Between the first of June and mid-

August the brine shrimp are retrieved by nets in an area off Antelope Island. Three air boats, 18 feet long and 6 feet wide, maneuverable in one to one-half foot of water and capable of carrying about 200 pounds of adult brine shrimp, are used in the gathering process. A 17-foot 50 horsepower outboard motor boat is also employed. Between mid-September and the end of November, the brine-shrimp eggs, which float on the surface and are washed up on the shoreline, are recovered by a four-wheel drive vehicle with scrapers and shovels. The catch is brought ashore and transported inland by truck to the processing plant near Salt Lake City, where the brine shrimps are frozen and placed in plastic bags, while the eggs are vacuum packed. In the best year 90,000 pounds of shrimp and 200,000 pounds of eggs were harvested, for which a royalty of $5,000 was paid to the State of Utah. The degree of the Lake's salt concentration affects the life of the brine shrimp.

46. *Boats on the Lake:* In this proceeding various water craft have been identified either by name, type, size, passenger capacity, use or name of the owner as having sailed upon the Lake during the period beginning 1824-1825 and ending in May of 1969. They total over 141 in number. The largest of these were six dump barges, each of which was 250 feet long, 55 feet wide and 12 feet, 4 inches deep at midship, being 2 feet deeper than that forward and aft, and were used in carrying material for the causeway in the 1957-1959 period and carried loads equivalent to that carried by 70 to 90 railroad cars. This type of vessel was superior to the kind customarily used on water like the Lake on January 4, 1896. Each of the barges was pushed by a tugboat of a thousand horsepower. Also used in this same construction were five deck barges, each 170 by 48 by 10 feet; pile driving barges; two twin-screw tugboats of 600 horsepower each, two dredges, three more tugboats of 200

horsepower; and a number of smaller boats. These boats, 39 in number, operated on the Lake in all seasons during the period of construction when the Lake level was between 26.5 feet (4,197.5 feet) and 24.5 feet (4,195.5 feet) deep, approximately 3.5 to 5.5 feet lower than at Statehood.

47. *Type of boats on the Lake:* The following are the types of water craft mentioned in the evidence as having sailed on the Lake:[29] (a) Rowboat, (b) bull boat, (c) scow, (d) skiff, (e) frigate, (f) sailboat, (g) sloop, (h) yawl, (i) schooner, (j) steamer or steamboat (sternwheel and sidewheel), (k) catamaran, (l) dory, (m) launch, (n) yacht, (o) DUKW or "duck", (p) Chris-Craft, (q) LCI, (r) airboat, (s) tugboat, (t) barge (deck, anchor, dump and pile driving), (u) float boat, (v) dredge, and (w) jet boat.

48. Water craft were identified in the evidence as having been used for transporting or hauling the following over the Lake:

(a) Passengers and workmen;

(b) Livestock such as cattle, sheep, horses and buffalo to and from Antelope and Fremont Islands;

(c) Grain;

(d) Lumber in the form of fence posts, cedar posts, railroad ties and telephone poles;

(e) Household supplies, flagstone, farm machinery, pump-station supplies;

(f) Material for the construction of the railroad trestles and causeways;

(g) Guano from Gunnison and Bird Islands to the mainland;

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29. For definitions, see Appendix E.

(h) Brine shrimp and brine-shrimp eggs;

(i) Ores, minerals and salt;

(j) Salt crystals and rocks; and

(k) Wild birds for Hogle Zoo.

49. The remaining identified craft were used for the following purposes:

(a) Exploration (3) and survey (2) of the Lake;

(b) Scientific investigation (5) and study of the Lake;

(c) Excursions (15), recreation (11), purely pleasure (3), and musical entertainment;

(d) Railroad maintenance and patrol of the trestle and causeway (4);

(e) Law enforcement patrol;

(f) Rescue operations;

(g) Harvest of brine shrimp and brine-shrimp eggs (4), and

(h) Publicity.

50. A number of the boats involved in the uses set forth above sailed on the Lake when its level was higher than 30 feet at Statehood. Yet these same boats could have sailed for like purposes had the need existed and were the Lake the same level as on January 4, 1896, with a few exceptions.

51. Not counting excursion trips, the boating uses of the Lake have been more of a private nature rather than by independent contractors for hire. Most of the boats on the Lake today are used privately and by the paying public for recreation and pleasure.

52. There was no evidence to show that any regularly scheduled freight or passenger service operated on the Lake.

53. *Antelope Island State Park:* The Utah Division of Parks and Recreation has created and is developing a 2,000 acre area at the north end of Antelope Island as a State Park. The plan envisions the construction of a 9-foot-deep marina estimated to cost $455,000, to accommodate 200 boats ranging in size from canoes to 45-foot crafts. The Division has awarded a concessionaire contract to the former operator of Sunset Beach, as the successful bidder, for the privilege of making boats available to the public for excursion tours and hire at the park.

54. *Great Salt Lake National Monument:* A bill has been introduced in the Senate (S. 25, 91st Cong., 1st Sess., Ex. P-15.) to establish Antelope Island as the Great Salt Lake National Monument and to be administered as a national park in accordance with the Act of August 25, 1916, 39 Stat. 535, 16 U. S. C. §§ 1-4. It is anticipated that this park, when completed, will attract a large number of tourists.

55. *Population centers near the Lake:* The region in the vicinity of the Lake, at least to the east and southeast, is well settled. In 1960, the numbers of persons in Davis County, Ogden and Salt Lake City, all of which are within twenty miles of the Lake, was approximately 325,000. This number comprised almost half the population of the State of Utah.

56. *Communities close to the Lake:* Except for Lakeside (not to be confused with former Lake Side) on the west shore of the Lake, which has a population of about fifty

people who maintain the tracks of the Southern Pacific Railway, there are no communities nearer than four miles of the Lake's waters. On the western and northern shores, except for Lakeside, there are no communities anywhere near the Lake within the State of Utah.

57. *Chemical compounds in the Lake:* The Lake has dissolved in it a number of chemical compounds (salts), which are valuable either in themselves or because certain elements are locked up in them. The soluble solids (99.43%) and their percentage by weight are as follows:

(a) Sodium Chloride (common table salt) ... 79.11%
(b) Magnesium chloride 9.95%
(c) Sodium sulphate (glauber salt) 6.22%
(d) Potassium sulphate 3.58%
(e) Calcium sulphate (lime sulphate) 0.57%

Others are potassium chloride, magnesium sulphate (epsom salt), potassium carbonate, sodium carbonate, and lithium chloride. The secret of profiting by them is to use an economical process of extracting, refining and transporting them to the market place. Common table salt (sodium chloride) was the first and still is the chief of the useful products derived from the brine. Extracting the salts from the brine is easy enough. The southeast shore is dotted with shallow open air ponds enclosed by dikes. The brine is first pumped into the ponds. As the sun and wind cause evaporation, the salts are deposited on the bottom of the ponds. "Ordinarily sodium chloride precipitates first, followed by potassium and magnesium chloride. When the salts that are wanted have reached the bottom, the remaining water is diverted to other ponds for further evaporation. Finally the minerals are harvested from the ponds' bottoms and refined." (*Business Week* (Oct. 15, 1966), pp.

94-96.) Sodium sulphate is used in the paper industry, magnesium in airplane building, chlorine as a bleaching and cleansing agent; magnesium sulphate in pharmaceuticals, dyes and explosives; and potassium for fertilizers. "In recent years, however, a number of business enterprises have shown interest in obtaining rights to produce magnesium, lithium and potash, and other substances of industrial value from the Lake's waters. Large areas of the adjacent upland flats are necessary for the large scale operations contemplated calling for the investment of many millions of dollars." (See Ex. P-34, p. 33.)

58. *Minerals in the Lake's bed:* Many compounds, containing minerals, are either known or their presence is indicated in the bed of the Lake. Calcium carbonate is widespread. Thin layers of sodium sulphate are buried at shallow depths in the sand at some localities. However, extraction of minerals from the bed has been small and intermittent. There is a possibility that oil and gas exist beneath the bed. Oil seeps are found at certain points. During the past fifteen years a total of 600,000 acres have been leased out by the State of Utah on a royalty basis for oil and gas exploration under the bed. A number of the major oil companies, such as Gulf, Humble and Superior, have participated in this venture.

59. *Minerals in the environs of the Lake:* Oolite sand deposits, used as a flux in the metal refining industry, are found at Lakeside. Dunes of this material, five to ten miles square and five to six feet thick, exist on the west and northwest section of the Stansbury peninsula. The State of Utah has issued leases on a royalty basis for its extraction. Dolomite, lithic sands, and pure limestone deposits, used in refractory material, may be unearthed all through the Lakeside, Newfoundland and Silver Mountains in the Desert.

Lowgrade (i.e., not commercially feasible to extract at present) phostatic beds, ten miles long and six feet deep, exist on the west side of the Terrace Mountains. At the surface of the Cedar and Grassy Mountains to the south and west of the Lake, ragonite, used in some building materials, exists. Copper, lead and silver are mined in the mountains to the south. These materials, when mined or gathered, are transported to the refineries and market place by truck and railroad.

60. *Diversions of water from tributaries of the Lake:* In 1965, 3,339,940 acre-feet of water have been diverted annually from streams flowing into the Lake and stored. In addition, there were substantial volumes of water diverted directly from these tributaries and consumptively used. According to the records of the Utah State engineer during the period 1949-59, the average yearly direct diversion and use was 1,395,351 acre-feet. When this figure is added to the above storage figure, the total direct annual diversion would equal 4,735,292 acre-feet of water. (Ex. P-31, p. 43-44.) There has been no testimony as to what effect this has on the annual level of the Lake.

61. *Artificial drawbacks and obstacles to travel and commerce on the Lake since Statehood:*

(a) Lucin Cutoff and the railroad causeway. These structures prevent the free travel of water craft of certain dimensions between Bear River Bay and the south portion of the Lake, and between the northwest arm with the south. Boats with beams greater than eleven feet have difficulty in passing through the trestle because of lateral clearance, especially when the level of the Lake is low. And when the level is high, boats have trouble in passing through the causeway culverts.

(b) The solid causeways connecting the tips of Antelope Island with the shore of the Lake prevent water craft from circling that island on the east, especially the one running from the northern top to the town of Syracuse. The culvert clearance was not shown.

(c) Unpredictability of the Lake's level and waterline is a factor in man's decision to build harbors and make improvements near the water's edge. Take, for example, Saltair, once a thriving beach resort along the Lake's front, now a desolate spot several miles inland.

(d) Uncertainty of title to the bed and exposed portions of the Lake's bed.

(e) The State of Utah has not made directly any expenditures for the construction and maintenance of a harbor on the Lake's shore, but it does plan to build a large marina on the northern top of Antelope Island. Beyond the assistance it gave in the construction of the Salt Lake County Boat Harbor, the United States has done nothing in the way of building or improving harbors on the Lake.

(f) Draining of sewage into the Lake.

(g) Diversion of water from the Lake's tributaries.

(h) Efforts on the part of both parties to this action to maintain the Lake's shores and some of its islands in their natural state by establishing, at great cost, wild water fowl sanctuaries.

62. While commerce and trade, unless pleasure boating be considered as such, has not flourished on the Lake, this is so not because, as the Government contends, the drawbacks and obstacles are too formidable, but rather, as the State maintains, the need, strong enough to overcome them,

has not arisen and commercial utilization on a large scale still awaits future improvements and demands.

63. *Artificial aids to travel on the Lake which may be implemented in the future:*

(a) Cutting out and maintaining of harbors in accessible locations on the shores of the Lake. The expense of doing this is relatively less than on other inland waterways customarily used for navigation because of the clay bottom with its low rock content, and the slow rate of silting or depositing of sediment by reason of the lack of tides and strong currents.

(b) Modifying of the Lucin Cutoff and solid causeways by the construction of draw or swing bridges of sufficient width.

(c) Increasing the extraction of large quantities of salt without greatly lowering the water volume.

(d) Enjoining the removal of water in large quantities by industry from the Lake.

(e) Enjoining the dumping of sewage into the Lake.

(f) Settlement of title to the Lake's bed and the relicted lands.

64. The lands conveyed to the State of Utah on June 15, 1967, pursuant to the Act of June 3, 1966 (80 Stat. 192), includes all of the lands below the meander line of Great Salt Lake as depicted on the map attached to the Stipulation filed by the parties in this action.

IV.

CONCLUSIONS OF LAW.

1. A state upon its admission into the Union acquires by virtue of its sovereignty whatever title to the beds of all navigable bodies of water within its borders possessed by the United States and not conveyed away by it prior to Statehood. This title, however, is subservient to the right of the Federal government to regulate such waters for the purpose of navigation.

2. The determination of the question of navigability, when asserted by a State as the foundation of its title to lands underlying bodies of water, is to be resolved on the basis of law recognized and applied by the Federal courts.

3. In any proceeding in the Federal courts involving the question of navigability of a body of water, the burden of proof is on the proponent of navigability.

4. The test for determining navigability under the Federal law, when asserted by a State as the basis of its title to land underlying bodies of water, must be determined as of the date of the admission of the State into the Union.

5. That test is one of fact regarding the capacity or susceptibility of the waters in their natural state, or ordinary condition, of being used, as the need may arise, by the then customary modes of trade and travel for useful commerce.

6. This capacity may be shown by (1) the actual use to which the water was put at the critical time, no matter in what mode the commerce may have been conducted;

(2) the physical characteristics of the body of water in question; (3) the actual uses to which the body of water has been put, either before or after the critical date, if it can be said that these uses could have been conducted on the body of water in its natural state or condition, and (4) experimentation demonstrating capacity.

7. The use of boats by their owners to carry livestock back and forth from Antelope and Fremont Islands to the shores of Great Salt Lake in connection with their business operations, as well as the use of such boats to carry supplies to these islands, and the hauling of guano from Gunnison and Bird Islands to the shores of the Lake can be deemed to show the utility of the waters for commerce to the general public.

8. The use of boats for the construction and maintenance of railroad trestles and causeways across Great Salt Lake, for the exploration and scientific study of the Lake, and for police patrol activities and rescue operations constitute trade and travel in the customary modes of trade and travel on water.

9. Boating for purposes of recreation and pleasure when conducted on vessels of the size and character shown in the evidence is useful commerce within the meaning of navigability.

10. The fact that the body of water in question is not capable for use for navigation in interstate or foreign commerce will not defeat a State's claim of title to the bed of that body of water.

11. The fact that the navigability of the body of water in question is beset with difficulties will not defeat a State's claim of title to the bed of that body of water.

12. The State of Utah is not estopped from asserting and offering proof that it had title to the bed of Great Salt Lake as of January 4, 1896.

13. Assuming that Great Salt Lake was not navigable on January 4, 1896, the United States should not be estopped from opposing the State of Utah's claim of title and asserting title in itself.

14. Great Salt Lake on the date of the State of Utah's admission into the Union was navigable under the laws of the United States.

15. On January 4, 1896, title to the bed of Great Salt Lake vested in the State of Utah, and did not remain in the United States.

16. The State of Utah is entitled to a decree by this Court quieting title to the bed of Great Salt Lake in itself as against the United States.

17. The United States is not entitled to a decree quieting title to the bed of Great Salt Lake in itself as against the State of Utah.

18. The State of Utah is not required to pay the United States for the land covered by Great Salt Lake and below the boundary line of the Lake's bed as of January 4, 1896.

19. Unless the parties to this action otherwise stipulate or agree, all issues relating to the exact boundaries of the bed of Great Salt Lake, as of January 4, 1896, are to be reserved for subsequent determination by this Court.

V.

PROPOSED DECREE.

The State of Utah has not submitted a recommended decree for the signing by this Court. In such absence, the Special Master proposes the following decree:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The United States of America, its departments and agencies, are enjoined, subject to any regulations which the Congress may impose in the interest of navigation or pollution control, from asserting against the State of Utah any claim of right, title and interest:

(a) to the bed of the Great Salt Lake lying below the meander line of Great Salt Lake as duly surveyed heretofore or in accordance with Section 1 of the Act of June 3, 1966, 80 Stat. 192, with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project,

(b) to the natural resources and living organisms in or beneath the bed of the Great Salt Lake as delineated in (a) above, and

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, lying below the meander line of the Great Salt Lake, as delineated in (a) above, except brine and minerals in solution in the brine or precipitated or extracted therefrom in whatever federal lands there may be below said meander line, together with the right to prospect for, mine, and remove the same, as set forth in Section 3 of the Act of June 3, 1966, 80 Stat. 192.

2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the lands, including any minerals, lying below the meander line of the Great Salt Lake, as delineated in 1(a), above, of this decree.

3. The prayer of the United States of America in its Answer to the State of Utah's Complaint that this Court "confirm, declare and establish that the United States is the owner of all right, title and interest in all the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended," is denied.

Respectfully submitted,

J. CULLEN GANEY,
Senior Circuit Judge,
Special Master.

VI.

APPENDIX.

DOCKET ENTRIES.

Mar. 1, 1967. Motion for leave to file bill of complaint filed.

May 1, 1967. Response to motion for leave to file complaint filed.

May 3, 1967. Motion for leave to file bill of complaint distributed.

May 15, 1967. Motion for leave to file bill of complaint granted and the United States is allowed sixty days to answer.

Jun. 5, 1967. Appointment of Special Master distributed.

Jun. 12, 1967. Ordered that the Honorable J. Cullen Ganey, Senior Judge of the United States Court of Appeals for the Third Circuit be, and he is hereby appointed Special Master in this case. See ORDER. [388 U. S. 902.]

Jun. 15, 1967. Oath of Special Master filed.

Jul. 14, 1967. Answer filed.

Sept. 18, 1967. Motion of Morton International, Inc. to intervene as defendant and file answer filed.

Oct. 11, 1967. Above Motion distributed.

Oct. 23, 1967. Motion of Morton International, Inc., for leave to intervene and file answer is referred to Special Master. Marshall, J., OUT. [389 U. S. 909.] Counsel for Morton International: Martin Jacobs, Myer Feldman, L. M. McBride, Frank A. Wollaeger.

Jan. 25, 1968. Brief of the State of Utah in opposition to motion by Morton International, Inc. for leave to intervene and answer filed.

Jan. 26, 1968. Motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a plaintiff, and its complaint filed.

Feb. 5, 1968. Reply brief of Morton International, Inc. to brief of State of Utah in opposition to motion of Morton International, Inc. for leave to intervene, filed.

Feb. 7, 1968. Motion of Great Lake Minerals & Chemicals Corporation for leave to intervene distributed.

Feb. 15, 1968. Joint motion for order directing manner of payment of Special Master's expenses filed. (NP).

Feb. 19, 1968. Supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a defendant, and its answer and cross claim filed.

Feb. 20, 1968. Memorandum for United States filed.

Feb. 20, 1968. Reply memorandum for United States filed.

Feb. 21, 1968. Supplemental motion of Great Salt Lake Minerals & Chemicals Corporation to intervene as a defendant, and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Feb. 21, 1968. Memorandum for U. S. in response to motion and amended motion of Great Salt Lake Minerals & Chemicals Corporation filed.

Feb. 24, 1968. Brief of the State of Utah in response to reply brief of United States, etc.

Mar. 5, 1968. Motion of Great Lake Minerals & Chemicals Corp. for leave to intervene distributed. Also supplemental motion of Great Salt Lake Minerals & Chemicals Corp. to intervene as a defendant and its answer and cross claim distributed. Also joint motion for order directing manner of payment of Special Master's expenses distributed.

Mar. 11, 1968. Joint motion for order directing manner of payment of Special Master's expenses *withdrawn.*

Mar. 11, 1968. Motions of the Great Salt Lake Minerals & Chemicals Corp. for leave to intervene as a plaintiff and to intervene, in the alternative, as a defendant, together with its answer and cross claim are referred to the Special Master for a report and recommendation. Such report and recommendation shall also include the motion of the Morton International, Inc., for leave to intervene heretofore referred to the Special Master, Marshall, J., Out. [390 U. S. 977.]

Apr. 16, 1968. Brief of Morton International, Inc. in response to stipulation and supplemental memorandum for the United States filed.

Apr. 17, 1968. Memorandum of Great Salt Lake Minerals & Chemicals Corp. regarding Stipulation between U. S. and State of Utah filed. Counsel for intervenor: Raymond T. Senior, Claron C. Spencer.

Apr. 22, 1968. Supplemental memorandum for U. S. and stipulation filed.

May 17, 1968. Joint motion for leave to file stipulation filed.

May 20, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Morton International, Inc., filed.

May 21, 1968. Waiver of right to file response to joint motion for leave to file stipulation by Great Salt Lake Minerals & Chemicals Corp. filed.

May 22, 1968. Joint motion for leave to file stipulation distributed.

Jun. 3, 1968. Joint motion for leave to file a stipulation, etc., referred to Special Master. Marshall, J., OUT. [391 U. S. 962.]

Oct. 28, 1968. Report of Special Master filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter, Marshall, J., OUT.

Dec. 11, 1968. Exceptions of Morton International, Inc. to Report of Special Master and supporting brief filed.

Dec. 13, 1968. Motion of Great Salt Lake Minerals & Chemicals Corporation for leave to file memorandum in lieu of exceptions to Report of Special Master filed.

Dec. 24, 1968. Exceptions of Morton International, Inc. to Report of Special Master distributed. Also motion of Great Salt Lake Minerals and Chemicals Corporation for leave to file memorandum in lieu of exceptions to Report of Special Master distributed.

Jan. 9, 1969. Motion and order extending time to file reply. (Until 1-21-69).

Jan. 13, 1969. Brief of the State of Utah in support of the Special Master's Report filed.

Jan. 21, 1969. Memo of U. S. on report of Special Master and exceptions thereto by Morton International filed.

Jan. 22, 1969. Exceptions of Morton International, Inc. to Report of Special Master distributed. Also motion of Great Salt Lake Minerals & Chemicals Corp. for leave to file memorandum in lieu of exceptions to Report of Special Master.

Feb. 25, 1969. Above redistributed.

Mar. 3, 1969. Determination of the Report of Special Master denying intervention to Morton International, Inc., approved. See ORDER. [394 U. S. 89.]

Appendix A.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF UTAH
SALT LAKE CITY, UTAH 84101

October 23, 1969

ANDREW JOHN BRENNAN
Clerk

Honorable J. Cullen Ganey
Senior United States Circuit Judge
United States Court of Appeals
For the Third Circuit
3030 United States Court House
Philadelphia, Pa. 19107

Dear Judge Ganey:

In reply to your letter of October 16, 1969, be advised that I have not been able to locate any admiralty action filed in this Court.

Enclosed are copies of Findings of Fact and Conclusions of Law, Judgment and Decree issued on December 14, 1960, by the Honorable Willis W. Ritter, Chief Judge of this Court, in the case of United States of America vs. State of Utah, et al, (C 137-59). This case involves navigability of a river and is, of course, not in any sense an admiralty action. Judge Ritter's decision was affirmed and is reported as State of Utah vs. United States of America, 304 F. 2d 23.

There are other cases regarding navigability of waters in Utah, including Great Salt Lake, among which are:

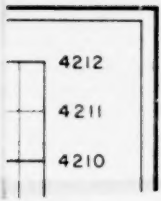
Robinson vs. Thomas, 75 Ut. 446, 286 P. 625
Monroe vs. State, 111 Utah 1, 175 P. 2d 759
United States vs. Utah, 51 S. Ct. 438, 283 U. S. 64, 75 L. Ed. 844.

It is a pleasure to be of service to your Honor. This office acts as the Clerk for both Divisions in the District of Utah.

Respectfully,

ANDREW JOHN BRENNAN
Andrew John Brennan, Clerk
United States District Court

AJB:am
enclosure



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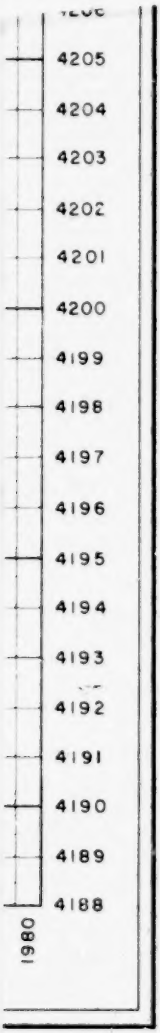

Appendix C.

(Letterhead of)
U. S. DEPARTMENT OF COMMERCE
ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION
WEATHER BUREAU FORECAST OFFICE
175 North 2300 West, Room 118
Salt Lake City, Utah 84116

April 7, 1970

Honorable J. Cullen Ganey
United States Court of Appeals
for the Third Circuit
3030 United States Courthouse
Philadelphia, Pennsylvania 19107

My dear Judge Ganey:

Your letter dated March 19, 1970 went through a number of other offices before reaching the Salt Lake City Weather Bureau. I am very sorry for the delay in answering your request.

It has been difficult to locate early records regarding the temperature of Great Salt Lake. Enclosed is a copy of a study containing some early data which was furnished by R. J. Madison, Hydrologist with the U. S. Geological Survey in Salt Lake City.

We do have official record of data that you requested regarding the temperature and precipitation at Salt Lake City from 1896 to 1969, which has been tabulated and is enclosed with this letter.

Respectfully yours,
WILLIAM T. CHAPMAN
William T. Chapman
Meteorologist in Charge

Enclosures

UNITED STATES DEPARTMENT OF COMMERCE

ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION

Weather Bureau Forecast Office

Station Salt Lake City, Utah *Date* April 7, 1970

I hereby certify that records of the Environmental Science Services Administration indicate: that the maximum temperature for January 4, 1896 was 34°F, and the minimum temperature was 9°F. The average pressure for the day was 25.977 inches of mercury.

WILLIAM T. CHAPMAN,
Meteorologist in Charge.

UNITED STATES DEPARTMENT OF COMMERCE

ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION

Weather Bureau Forecast Office

Station Salt Lake City, Utah *Date* April 7, 1970

I hereby certify that records of the Environmental Science Services Administration indicate: the annual maximum and minimum temperatures, and precipitation for the years 1896 to 1969 are as follows:

Year	Temperature		Total	Year	Temperature		Total	Year	Temperature		Total
	High	Low	Precip		High	Low	Precip		High	Low	Precip
1896	97	–2	18.42	1921	99	12	14.45	1946	100	11	16.51
1897	98	2	16.74	1922	98	–7	21.69	1947	101	3	17.86
1898	97	–3	16.09	1923	95	4	18.96	1948	99	6	15.43
1899	97	–10	17.57	1924	97	–8	13.86	1949	101	–7	15.75
1900	101	2	11.53	1925	103	12	17.17	1950	99	–3	13.45
1901	101	4	16.08	1926	101	8	15.61	1951	101	–3	17.50
1902	98	–4	11.41	1927	100	8	20.69	1952	100	–1	15.14
1903	98	–4	14.62	1928	100	9	12.10	1953	101	10	12.32
1904	97	6	16.31	1929	99	–1	14.47	1954	102	7	12.43
1905	97	–4	14.23	1930	100	–4	15.73	1955	102	–14	13.63
1906	96	7	21.28	1931	105	5	11.40	1956	101	–3	12.39
1907	95	13	19.22	1932	97	–8	14.88	1957	99	–2	18.44
1908	95	6	20.85	1933	101	–10	11.11	1958	102	6	10.72
1909	101	4	19.68	1934	103	14	14.29	1959	101	–1	13.82
1910	96	1	11.25	1935	99	2	12.96	1960	107	–4	12.37
1911	96	6	15.13	1936	101	2	17.75	1961	104	–10	11.75
1912	94	6	19.19	1937	102	–11	14.54	1962	101	–14	14.90
1913	97	–2	16.69	1938	102	14	16.41	1963	102	–18	14.09
1914	97	11	16.69	1939	103	7	10.68	1964	101	–10	17.87
1915	98	5	14.49	1940	103	9	18.58	1965	98	3	18.43
1916	99	2	16.06	1941	102	14	21.24	1966	102	–3	8.99
1917	97	2	14.17	1942	101	–2	16.12	1967	101	2	16.52
1918	101	4	16.11	1943	103	4	12.81	1968	102	0	21.11
1919	100	0	13.42	1944	100	7	18.87	1969	99	1	16.09
1920	98	8	21.56	1945	98	11	18.82				

WILLIAM T. CHAPMAN,
Meteorologist in Charge.

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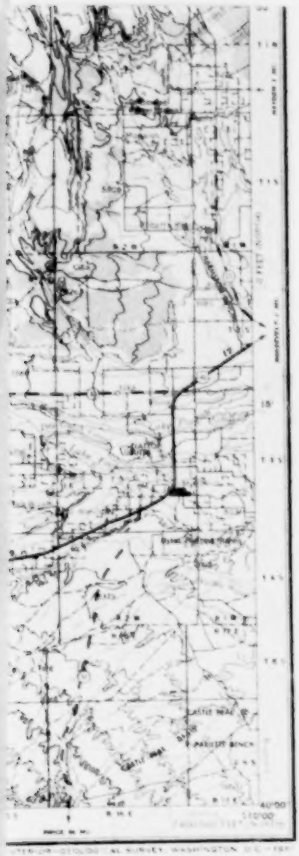

SECTIONIZED TOWNSHIP

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

SALT LAKE CITY, UTAH, WYOMING

1954

Appendix E.

Definition of Water Craft.

Catamaran (Kăt′.a.ma.ran′): Any vessel with twin hulls side by side.

Dory (dō.rĭ): A flat-bottomed boat with flairing sides.

DUKW (or "duck"): The code designation for a 2½-ton 6-wheel-drive truck equipped with a propeller and watertight hull for ferrying, lighter service, or amphibious landing of troops. (See Ex. P-14.)

Frigate (frig′.it): A light vessel propelled by sail and oars.

Launch: An open, or largely undecked, power-driven boat.

LCI: A 50 to 60 foot long military landing craft, for infantry.

Schooner (skōō′.ner): A fore-and-aft rigged vessel, typically having two masts, with the smaller sail on the foremast and the mainmast stepped nearly amidships.

Scow: A large flat-bottomed boat, with broad, square ends, used as a lighter.

Skiff: A boat with centerboard and spiritsail, light enough to be rowed.

Sloop: A fore-and-aft rigged vessel with one mast and a single headsail jib.

Yacht (yŏt): Any one of various types of relatively small vessels, characteristically with sharp prow and graceful lines, and ordinarily used for pleasure.

Yawl: A fore-and-aft rigged vessel carrying a mainsail and one or more jibs, with mizzenmast fore and aft.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 26, 1970

Pursuant to the order of the Court,[1] the United States presents the following exceptions to the Report of the Special Master filed October 26, 1970:

I

With respect to the Conclusions of Law of the Special Master appearing at pages 50–52 of his Report:

[1] On October 26, 1970, the Court ordered: "The report of the Special Master is received and ordered filed. Exceptions, if any, with supporting briefs, shall be filed within sixty days." On December 21, 1970, the Court extended the time for filing the exceptions and supporting brief of the United States to and including January 8, 1971. The Report of the Special Master is referred to herein as "R".

1. The United States excepts to the declaration in Conclusion of Law 5 that the "test [for determining navigability] is one of fact regarding the capacity or susceptibility of the waters being used, as the need may arise, by the then customary modes of trade and travel for useful commerce" (R. 50).

2. The United States excepts to the ruling in Conclusion of Law 6 that the capacity of the Lake for useful commerce "may be shown by * * * (2) the physical characteristics of the body of water in question; * * * and (4) experimentation demonstrating capacity" (R. 50–51).

3. The United States excepts to the determination in Conclusion of Law 7 that the "use of boats by their owners to carry livestock back and forth from Antelope and Fremont Islands to the shores of Great Salt Lake in connection with their business operations, as well as the use of such boats to carry supplies to these islands, and the hauling of guano from Gunnison and Bird Islands to the shores of the Lake can be deemed to show the utility of the waters for commerce to the general public" (R. 51).

4. The United States excepts to the determination in Conclusion of Law 8 that the "use of boats for the construction and maintenance of railroad trestles and causeways across Great Salt Lake, for the exploration and scientific study of the Lake, and for police patrol activities and rescue operations constitute trade and travels in the customary modes of trade and travel on water" (R. 51).

5. The United States excepts to the determination in Conclusion of Law 9 that "[b]oating for purposes of recreation and pleasure when conducted on vessels of the size and character shown in the evidence is useful commerce within the meaning of navigability" (R. 51).

6. The United States excepts to the holding in Conclusion of Law 10 that the "fact that the body of water in question is not capable for use for navigation in interstate or foreign commerce will not defeat a State's claim of title to the bed of that body of water" (R. 51).

7. The United States excepts to the ruling in Conclusion of Law 14 that "Great Salt Lake on the date of the State of Utah's admission into the Union was navigable under the laws of the United States" (R. 52).

8. The United States excepts to the ruling in Conclusion of Law 15 that "[o]n January 4, 1896, title to the bed of Great Salt Lake vested in the State of Utah, and did not remain in the United States" (R. 52).

9. The United States excepts to the ruling in Conclusion of Law 16 that the "State of Utah is entitled to a decree by this Court quieting title to the bed of Great Salt Lake in itself as against the United States" (R. 52).

10. The United States excepts to the ruling in Conclusion of Law 17 that the "United States is not entitled to a decree quieting title to the bed of Great Salt Lake in itself as against the State of Utah" (R. 52).

11. The United States excepts to the ruling in Conclusion of Law 18 that the "State of Utah is not required to pay the United States for the land covered by Great Salt Lake and below the boundary line of the Lake's bed as of January 4, 1896" (R. 52).

II

With respect to the Findings of Fact of the Special Master appearing at pages 9–49 of his Report:

1. The United States excepts to the determination in Finding of Fact 31 that the "Great Salt Lake, as of January 4, 1896, was navigable within the meaning given to that word by the Federal courts for the purpose of determining a state's title to the bed of a body of water at statehood," (R. 29), inasmuch as it states a legal conclusion as to the "navigability" of the Lake at statehood.

2. The United States excepts to the determination in Finding of Fact 62 that "[w]hile commerce and trade, unless pleasure boating be considered as such, has not flourished on the Lake, this is so not because, as the Government contends, the drawbacks and obstacles are too formidable, but rather, as the State maintains, the need, strong enough to overcome them, has not arisen and commercial utilization on a large scale still awaits future improvements and demands" (R. 48–49).

III

The United States excepts to the Proposed Decree of the Special Master appearing at pages 53–54 of his Report, insofar as it grants the relief sought by the State of Utah and denies the relief sought by the United States.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

413-348—71——2

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

BRIEF OF THE UNITED STATES IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED OCTOBER 26, 1970

REPORT OF THE SPECIAL MASTER

The Report of the Special Master was filed in this Court on October 26, 1970. On that same date, the Court ordered that exceptions to the Report, with supporting briefs, be filed within sixty days. On December 21, 1970, the Court extended the time for filing the exceptions and supporting brief of the United States to and including January 8, 1971. The Court has original jurisdiction.

QUESTIONS PRESENTED

1. Whether for the purpose of determining ownership of the bed of the Great Salt Lake, the Lake was navigable in fact as a highway of commerce at the time of Utah's admission to the Union.

2. Whether for such purpose the Lake was navigable in law as a highway of interstate or foreign commerce.

STATEMENT

This original action was filed by the State of Utah [2] to quiet in it title to the bed of the Great Salt Lake. The only question presently before this Court is whether at the time of Utah's admission to the Union (January 4, 1896) the Great Salt Lake was navigable, as Utah contends, or was nonnavigable, as the United States contends.[3] That question was referred to a Special Master, 394 U.S. 89, 96, who held hearings concerning the question of navigability in fact and considered arguments directed to the conclusions to be drawn from the evidence presented. In those hearings, the United States reserved but did not argue the proposition that the Lake was non-navigable as a

[2] The litigation was brought pursuant to the Act of June 3, 1966, 80 Stat. 192. Pursuant to that statute, the United States quitclaimed to the State of Utah all its title and interest (with certain exceptions not here relevant) to the bed of the Great Salt Lake. Utah in turn is to pay the United States the value of the property so conveyed, unless it establishes that it, rather than the United States, was the rightful owner of the Lake bed prior to the conveyance from the United States; it is for this purpose that Utah initiated this action.

[3] Should the United States prevail on this issue, this litigation would be ended, since the sole basis of Utah's claim is that the lands now in dispute were, at the relevant time, the bed of a *navigable* body of water and, as such, passed to Utah upon its statehood. On the other hand, if Utah prevails further proceedings will be necessary to determine other issues, notably whether the State has lost its original title by operation of the law of "reliction" to those portions of the former Lake bed which since have become exposed.

matter of law because it forms no part of a water route in interstate or foreign commerce. See pp. 29–34 *infra*. The Special Master has now prepared and filed with the Court his Report, to which the exceptions herein stated are directed.

The government's exceptions are principally to the Special Master's conclusions of law. We contend, as is more fully explained below, that the measure of navigability in fact for state title purposes is whether at the time of statehood the waterway was used or susceptible of being used, in its ordinary condition, as a highway of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In general, we do not disagree with the Special Master's findings of the facts to which this test is to be applied.[4] In summary, those findings indicate the following:

The Great Salt Lake is located entirely in the State of Utah (Finding of Fact 5, R. 10). In 1896, it had a maximum length of approximately 77 miles, a maximum width of 32.5 miles, and a maximum depth of about 30 feet (Finding of Fact 6, R. 10). The Lake is a drainage spot for a large area; it has no outlet, and as a result a high concentration of soluble solids (salts) exists (Findings of Fact 13 and 16, R. 18, 19). The tributary rivers flowing into the Lake do not provide a navigable water link with any other state or country (Finding of Fact 24, R. 24). Except in a few places, the Lake's shores and bed gently shelve at the

[4] But see p. 4, *supra*.

rate of about one foot per thousand feet (Findings of Fact 8 and 11, R. 13, 17). The gradual shelving of the basin and the softness of the shore surface make it unusually difficult to get boats from dry land into floatable water—to reach water five feet deep, one must move out a mile or more from the water's edge (Finding of Fact 26(a), R. 25). The Lake's flat, barren, bleak, and treeless shores are ringed with great stretches of salt flats, salt marshes, and bogs, some of which are in places several miles in width (Finding of Fact 18, R. 20–21), and which make an approach to its shores by foot, horseback, or horsedrawn vehicle very difficult (Finding of Fact 27(a), R. 27). The Lake affords no convenient locations for launching or landing boats (Finding of Fact 26(d), R. 26). Although since 1850 there have been sizable settlements within several miles of the Lake (Finding of Fact 19, R. 21), in 1896 none of these population centers were within ten miles of the Lake's shore (Finding of Fact 28, R. 28). Except for Lakeside, a community of about fifty people who maintain the tracks of the Southern Pacific Railway over the Lake, even today there are no communities nearer than four miles to the Lake's water (Finding of Fact 56, R. 44–45). And though there have been boats on the Lake (Findings of Fact 36(a), 36(c), 38, 45, 46, 47, 48 and 49, R. 33–34, 35–36, 40–43), the boating uses of the Lake, not counting excursion trips, have been more of a private nature than by independent contractors for hire (Finding of Fact 51, R. 43). There is no evidence indicating that any regularly scheduled freight or pas-

senger service ever operated on the Lake (Finding of Fact 52, R. 44). The high salt concentration results in disagreeable salt spray from the waters of the Lake and in precipitation and encrustation of sodium sulphate in the Lake and on objects in the water, including boats (Findings of Fact 26 (f), (g), 35, and 39(a), R. 26–27, 32–33, 37–38).

The Special Master found that factors favoring travel on the Lake are that its level remains relatively constant and changes only gradually;[5] water depths of 5 to 30 feet exist over wide areas; there are no underwater obstructions or floating obstacles; the surface is calm and no tides or strong currents are present; and the high salt concentration significantly increases the water's buoyancy and lowers its freezing point (Finding of Fact 25, R. 24). The Master also found that while commerce and trade have not flourished on the Lake, this is because a sufficient need for such use has not yet arisen; commercial utilization therefore still awaits future improvements and demands (Finding of Fact 62, R. 48–49). We except to this finding for the reasons stated later in our brief.

Based on these findings, the Special Master concludes that the Great Salt Lake was, at the date of its statehood and in its natural state, "navigable" for State title purposes (Finding of Fact 31 and Conclusion of Law 14, R. 29, 52). It would follow from that finding that title to the bed of the Great Salt Lake had vested in Utah at statehood and thus

[5] But see Appendix B to the Master's report.

that Utah is not required to pay the United States any compensation for the latter's conveyance of the Lake bed to Utah pursuant to the Act of June 3, 1966 (Conclusions of Law 15, 18, and Proposed Decree, R. 52–54).

SUMMARY OF ARGUMENT

To prevail in this litigation, Utah must establish that at the time of its admission into the Union the Great Salt Lake, in its natural state, was "navigable in fact." For state title purposes, that phrase includes only lakes and rivers which "are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball,* 10 Wall. 557, 563. The Lake has not at any time actually been used for the relevant kind of commercial trade or travel. And it is not "susceptible" of commercial use in its ordinary condition; its shallowness, the extreme difficulty of access to it, its gradual shelving, the total desolation of its shoreline and surroundings, are physical features which preclude its use as a highway of commerce. The essentially undisputed facts, we submit, lead to the conclusion that at the time of Utah's statehood the Great Salt Lake was not navigable in fact.

We further submit that the Special Master gave undue weight to the physical capacity of the Lake to float commercial water craft. While this factor is essential, it is not of itself sufficient. The determinative issue is whether the waterway is, or is susceptible of

being, a highway of commerce. The physical features of the Lake and its environs preclude its use as a highway of commerce, even though commercial craft could float on the Lake. And the uses cited by the Master as showing commercial utilization of the Lake are not uses of the relevant kind and do not show practical usefulness of the Lake to the public as a commercial highway. Under the proper standards, the Lake was not navigable in fact at the pertinent time and the Master's contrary conclusion should not stand.

Nor is the Lake navigable in law, since it has no interstate or foreign connection and thus is not a channel of interstate or foreign commerce. At common law, only tidal waters were navigable. This principle was found to be unsuitable as applied to the great rivers and inland lakes of this country; accordingly, such waters were held to be navigable in law, if navigable in fact, even though above tide water. But in every instance—with but one exception of which we are aware—the "American" rule was invoked only with respect to the great waterways which constituted a part of a highway of interstate or foreign commerce. Indeed, this is an essential element of the navigability concept for federal admiralty and Commerce Clause purposes. We submit that for state title purposes, too, the extension of the common-law rule should be limited to waterways which are channels in interstate or foreign commerce, and that since the Great Salt Lake does not meet this requirement, it is not navigable in law.

413-348—71——3

ARGUMENT

I. GOVERNING LEGAL PRINCIPLES WITH RESPECT TO NAVIGABILITY IN FACT

Two propositions set the framework for the consideration of the navigability of the Great Salt Lake. The first is that the burden of proof is on the proponent of navigability—here, Utah. See *Harrison* v. *Fite*, 148 Fed. 781, 785 (C.A. 8); *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 867 (Ct. Cls.). The second proposition is that "[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts." *United States* v. *Holt Bank*, 270 U.S. 49, 55–56. *See also Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U.S. 77, 87; *United States* v. *Utah*, 283 U.S. 64, 75; *United States* v. *Oregon*, 295 U.S. 1, 14. It follows that the decisions of the Supreme Court of Utah taking judicial notice of the navigability of Great Salt Lake[6] cannot be deemed to have established the Lake's navigability for our purposes. The question is, rather, whether the State of Utah, in the recent proceedings before the Special Master, has succeeded in showing that Great Salt Lake is a navigable body of water according to the rules recognized and applied in federal courts.

At the outset, it is useful to restate how the issue of navigability arises in this case. Utah's claim to the bed of the Great Salt Lake ultimately rests upon the proposition that these lands passed to the State upon

[6] *Robinson* v. *Thomas*, 75 Utah 446, 286 Pac. 625; *Deseret Livestock Co.* v. *State*, 110 Utah 239, 171 P. 2d 401.

its admission to the Union. This results, it is said, from the operation of the "equal footing" principle which, as construed in *Pollard's Lessee* v. *Hagan*, 3 How. 212, and subsequent cases, requires that the newly admitted States be accorded the same property interest in submerged lands as was enjoyed by the thirteen original States as successors to the rights of the British Crown. The governing notion was that the principal highways of water commerce—which in England are the tidal rivers—ought to be treated as public assets, immune from the claims of private landowners. The overriding reason for keeping the beds out of private ownership was—and is—to prevent interference with the free use of navigable waters as commercial highways. See *Barney* v. *Keokuk*, 94 U.S. 324, 338.

The common law conceded to the English Crown only the beds of navigable *tidal* waters, which were of course arms of the sea, subject to the jurisdiction of the Admiralty, and arteries of foreign commerce. This equation of navigability with tidewater was early found ill-suited to the geography of America, and rejected, both as a restriction on the federal admiralty jurisdiction (see *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 454–459), and as a test of navigability for property purposes as well (*Barney* v. *Keokuk*, *supra*, 94 U.S. at 337–338). But the relationship to commercial use remained. Under the Federal law that emerged, only those waterways on which, in the words of *Genesee Chief*, "commerce is carried on between different states or nations," were considered to be navigable.

The classic definition of navigable waters occurs in *The Daniel Ball*, 10 Wall. 557, 563:

> Those waters must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * *

Although that was a case construing the commerce clause, the definition just quoted is almost invariably cited in both admiralty cases (*e.g., In re Garnett*, 141 U.S. 1, 15), and cases involving State title (*e.g., United States* v. *Utah, supra*, 283 U.S. at 76).

What *The Daniel Ball* teaches is that navigability in fact, in federal law, is more than ability to float a vessel. A body of water is navigable in fact only if, in its natural condition, it is useable as a "commercial highway."[7] The last expression carries several relevant implications:

> (1) That the movement is a purposeful aspect of the flow of goods or passengers from one point to another, rather than, say, the aimless cruising of pleasure boats or even the

[7] The "commercial highway" requirement in admiralty and commerce clause contexts embodies a legal as well as a factual element: the waters not only must be navigable in fact, but also must form part of a highway *in interstate or foreign commerce*. See *The Daniel Ball*, 10 Wallace 557, 563; *The Montello*, 11 Wall. 411, 415; *Moore* v. *American Transp. Co.*, 24 How. 1, 39; 33 U.S.C. 2.10-5(a). We argue below, pp. 29–34, that both elements must be satisfied for state title purposes, and that even if the Great Salt Lake meets all other tests, it is nonnavigable because it has no interstate or foreign link.

scheduled round trips of a sightseeing or excursion vessel;

(2) That the commerce involved is, at least potentially, of substantial volume and frequency;

(3) That the use of the body of water for transporting goods or people is practical, including, presumably, physical possibility and economic feasibility.

These characteristics have been listed as ingredients of navigability in all contexts. But, whatever the appropriateness of demanding so much to establish admiralty jurisdiction, or congressional power under the commerce clause, it is clear that these are the enduring criteria of navigability in connection with determining a state claim to the bed of an inland lake or river. Thus, a navigable body of water in this sense has been defined as a waterway which has "capacity for practical and beneficial use in commerce" (*Oklahoma* v. *Texas*, 258 U.S 574, 591), or, more directly, "as a channel for useful commerce." *Brewer-Elliott Oil and Gas Co.* v. *United States, supra*, 260 U.S. at 86; *United States* v. *Holt Bank, supra*, 270 U.S. at 56; *United States* v. *Utah, supra*, 283 U.S. at 76. The matter is well stated in the landmark opinion in *Harrison* v. *Fite*, 148 Fed. 781, 783 (C.A. 8), approvingly cited by this Court in several decisions (*e.g., Oklahoma* v. *Texas, supra*, 258 U.S. at 591; *United States* v. *Oregon, supra*, 295 U.S. 23):

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable

> floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. * * *

One aspect of the test of navigability is unique to the state title context: that is the *time* when the water course must be navigable. The time is *not* the present, as it is for the purpose of admiralty jurisdiction. See *The Robert W. Parsons*, 191 U.S. 17, 28. Nor may we follow the generous test applicable to the exercise of congressional powers under the commerce clause, which treats as subject to regulation waters which were once navigable but are no longer (*e.g., Economy Light Co.* v. *United States*, 256 U.S. 113, 123–124), or which only recently have become passable (*e.g., Philadelphia Light Co.* v. *Stimson*,

223 U.S. 605, 634–635), and also, streams which are not now, and never have been, navigable, but may become so in the future by improvements (*e.g., United States* v. *Appalachian Power Co.*, 311 U.S. 377, 409; and see 33 U.S.C. 2.10–5).[8] For the purpose of determining a state claim to water bottoms, the inquiry as to navigability is limited to the condition of the waters on the date of the State's admission to the Union; all else is irrelevant. *Shively* v. *Bowlby*, 152 U.S. 1, 18, 26; *Oklahoma* v. *Texas*, *supra*, 258 U.S. at 591, 594; *United States* v. *Utah*, *supra*, 283 U.S. at 75; *United States* v. *Oregon*, *supra*, 295 U.S. at 14; see *United States* v. *Applachian Power Co.*, *supra*, 311 U.S. at 408.

An important corollary of the rule that navigability must be shown at statehood, not at some future time, is that the water course should be judged in its natural state. Future improvements that would remove obstacles to commerce or otherwise improve navigability are not relevant. *United States* v. *Oregon*, *supra*, 295 U.S. at 23; *Brewer-Elliott Oil and Gas Co.* v. *United States*, *supra*, 260 U.S. at 86; *Oklahoma* v. *Texas*, *supra*, 258 U.S. at 586, 588, 591.

This is not to say that actual use of the river or

[8] To the extent the commerce clause confers authority over waters tributary to navigable waters, or which could be made navigable only by improvement, it is no longer tied to the "ordinary conditions" language of *The Daniel Ball*, *supra*. But the potential for exercise by the federal government of jurisdiction over an interstate stream or tributary under the commerce clause does not result in the vesting in the State of title to the bed of that stream. Cf. *Oklahoma* v. *Texas*, *supra;* and pp. 22, 31 and n. 14, *infra*.

lake as an artery of commerce at the date of the State's admission is essential. As said in *United States* v. *Utah, supra,* 283 U.S. at 82, "where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." Thus, one may judge navigability by assuming a natural development of the area and considering whether the stream or lake, given its geographic setting, its dimensions and direction, will likely become a commercial highway. But the potential of a water course as an artery of commerce may appear lacking from the beginning, despite its ability to float a large vessel. And subsequent history will often be relevant to ratify that judgment.

II. THE GREAT SALT LAKE IS NOT NAVIGABLE IN FACT

The Special Master's findings, we submit, will not support a conclusion that the Great Salt Lake, at the time of Utah's admission to the Union in 1896, was navigable in fact—a phrase encompassing only those waters which "are used, or are susceptible of being used, *in their ordinary conditions,* as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball, supra,* 10 Wall. at 563 (emphasis added). The Special Master found that various types of boats had used the Lake in pursuit of various activities, both before and after statehood (Findings of Fact 47 and 48, R. 42–43). But

the activities did not involve use of the Lake "as highways for commerce." Instead, as the Special Master concluded (Finding of Fact 51, R. 43), "the boating uses of the Lake have been more of a private nature rather than by independent contractors for hire."[9] And these uses are not sufficient to determine the question here in issue—whether the lake is navigable in fact.

Of course, the Lake might nevertheless be deemed navigable if, at statehood, it was "susceptible" of commercial use. In this regard, the feasibility of future artificial improvements to the water course—or indeed, the predictability of natural changes—is *not* to be taken into account in assessing navigability for the purpose of a state claim to submerged lands. The controlling principle is that actual navigation at statehood need not be shown if the water course, in its then state, was susceptible of commercial navigation but

[9] The Master qualifies this finding by "[n]ot counting excursion trips." Excursion uses were quite properly excluded from consideration. To be a highway of trade and travel, a body of water ought to lead somewhere, and lend itself to being used by traffic to get from one end to the other. A boat which ventures forth on a 2,000 square mile body of water for a brief period of time, and then, without having in the interim discharged freight or passengers, returns to the place from which it started, cannot be said to have been engaged in "useful commerce", or to have demonstrated the Lake's "useful capacity as a public highway of transportation." If the existence on a body of water of excursion boats, or any boats hired for pleasure, could be construed to establish the navigability of that body of water, then the lake in the Public Garden in Boston, plied regularly in the summer by a fleet of small boats, would be a navigable body of water, as would countless other small ponds in parks throughout the country.

was not yet so used because of prevailing "conditions of exploration and settlement." *United States* v. *Utah*, *supra*, 283 U.S. at 82.

At the outset, exception must be taken to the Master's Finding of Fact 62 (R. 48–49): "While commerce and trade, unless pleasure boating be considered as such, has not flourished on the Lake, this is so not because, as the Government contends, the drawbacks and obstacles are too formidable, but rather, as the State maintains, *the need, strong enough to overcome them,* has not arisen and commercial utilization on a large scale still awaits *future improvements and demands.*" (Emphasis added.) This assertion does not serve to demonstrate the Lake's navigability, since even admittedly non-navigable waterways can be commercially utilized, given the "demand" and "future improvements." This finding, rather, shows that commercial use of the Lake has not occurred because of existing obstacles; and practically viewed, these obstacles even now preclude use of the Lake as a highway for commerce, and did so at the time of statehood.

Moreover, it is doubtful if the "susceptibility" rule is applicable here at all. The Lake was discovered (1824–1825) more than 70 years before the date of Utah's statehood (Finding of Fact 1, R. 9) and settlement of the area had largely occurred by that time (Finding of Fact 19, R. 21). In such circumstances, it is plain that the limited use of the Lake before and at the time of statehood cannot be attributed to the undeveloped character of the area. And the history of the Lake since 1896 sufficiently shows that time has not

turned it into a useful commercial highway. The fact is that the Great Salt Lake is not now and has never been "susceptible" of filling that role.

In any event, we submit that under the facts as found by the Master the Great Salt Lake is not "susceptible" to use as a highway of commerce. Undoubtedly, it is the physical situation of the Lake which is chiefly responsible for the insignificant use made of the Lake over the last 145 years. The Lake is a residue of an ancient sea, and occupies a shallow depression in the otherwise remarkably flat plain which once was the bed of that sea. It is the drain for a great area, the Lake itself having no outlet. When the surface of the Lake is at 4,195 feet above sea level, the maximum depth of the Lake is about 25 feet; the *average* depth of the Lake, however, because of the gradual slope of its shores, is much less. Thus, all around that portion of this great flat basin covered by the waters of the Lake stretch huge expanses of smooth, flat, salt-impregnated lands not covered by the waters of the Lake. And the flatness and shallowness of this closed basin (that is, a basin without an outlet) make the shores of the lake extraordinarily desolate, and access to the Lake extremely difficult—conditions which existed at the time of statehood and for many years before.

Indeed, present circumstances illustrate how well the Lake's encircling bogs, marshes, and flats fend off intruders. Except for a town (Lakeside) inhabited only to maintain railroad tracks in the area, there are no settlements or communities of any kind immedi-

ately bordering on the Lake. In fact—and again with the exception of Lakeside—there are absolutely no communities at all anywhere near the western and northern shores of the Lake. And even along the southern and eastern shores of the Lake, there are no settlements immediately adjacent to the water: all of the centers of habitation here are separated from the Lake by from four to twenty miles of bogs, marshes, and flats.

It is unusually difficult to get boats from dry land across the boggy marshes into floatable water. This is but one aspect, although in this case a very important aspect, of the general inaccessibility of the Lake resulting from the flatness and gradual shelving of the basin in which it is located. And in consequence of the physical situation of the Lake—its being in a closed basin, without an outlet—the level of the Lake is subject to marked, although gradual, fluctuation. Since the basin in which the Lake is located is so flat, the fluctuations in the level of the Lake result in the covering or uncovering of large areas of lands, a condition which further thwarts use of the Lake.

In fine: the shallowness of the Lake, the difficulty of access to it, the great distances from the far water line of the Lake to depths capable of floating a boat, the inhospitable nature of the great bogs, marshes, and salt flats surrounding the Lake, the desolateness of the immediate environs of the Lake, are physical features of the Lake which negative its susceptibility to use as a highway of commerce; these physical features, coupled with the facts that there are no communities

along the shores of the Lake, and that in the 145 years that people have been living near the Lake, it has been but sparsely used, there having been no true commercial use of the Lake at any time; all this compels the conclusion that the Lake, as a matter of fact, was not navigable at the time of the admission of Utah into the Union.

III. EXCEPTIONS TO THE MASTER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE LAKE'S NAVIGABILITY IN FACT

The Master declares (Conclusion of Law 5, R. 50) that the "test [for determining navigability] is one of fact regarding the capacity or susceptibility of the waters in their natural state, or ordinary condition, of being used, as the need may arise, by the then customary modes of trade and travel for useful commerce." [10] Next it is said that "capacity" for navigability may be shown by actual use at the critical time; physical characteristics of the body of water; actual uses at any time, if such uses could have been conducted at the critical time on the Lake in its natural state; and experimentation (Conclusion of Law 6, R. 50–51). The Lake's physical capacity to carry water transportation is detailed in Finding of Fact 31, R. 29, and we concede that indeed commercial water craft could *float* on the Lake. Actual commercial utilization of the

[10] We submit that while the setting against which "navigability" is to be assayed certainly involves fact finding, yet the ultimate conclusion whether the facts as found show "navigability" presents a question of law. Finding of Fact 31, accordingly, is more properly treated as a conclusion of law.

Lake is found in the use of boats by their owners to carry livestock and supplies to and from islands in the Lake and to haul guano from other islands (Conclusion of Law 7, R. 51); the use of boats for construction and maintenance of railroad trestles and causeways, for exploration and scientific study, and for police patrol and rescue activities (Conclusion of Law 8, R. 51); and recreational and pleasure boating (Conclusion of Law 9, R. 51). From this it is concluded that Great Salt Lake was "navigable" at the date of statehood (Finding of Fact 31, R. 29; Conclusion of Law 14, R. 52). And it thus follows that the bed of the Lake is owned by Utah (Conclusions of Law 15–18, R. 52). The Master's proposed decree (R. 53–54) accordingly grants Utah the relief it seeks.

In his statement and application of the "test" of navigability in fact, the Master has placed undue reliance on the physical *capacity* of the Lake to float commercial water craft.[11] While surely significant, this factor is by no means controlling; rather the appropriate measure is whether the waterway is, or in its natural state is susceptible of being, a highway of commerce. And this measure is satisfied only when: (1) the "commerce" on the waterway involves (or, in the water-

[11] Thus in Finding of Fact 31, R. 29, the Master states that his finding that the Lake was "navigable" at statehood is based on the following:

"(a) On January 4, 1896, the Lake was 30.2 feet deep or 4200.2 feet above sea level.

"(b) As of that date, the Lake was physically capable of being used in its ordinary condition as a highway for floating and affording passage to water craft in the manner over

way's natural state, is capable of involving) the flow of goods and passengers from one point to another; (2) that commerce is, at least potentially, of substantial volume and frequency; and (3) the use of the waterway for such commerce is practical, so as to be both physically possible and economically feasible.

The hauling of livestock, supplies, and guano to and from the Lake's islands is not commercial use of the relevant kind. The boats used here belonged to the owners of the livestock or the guano; thus the hauling was done, not by a carrier for the purpose of making money by the act of carriage, but by a person or organization whose business was ranching or production of guano and for whom the carriage was only one step in an operation centering on the use of the Lake, not as a highway for trade and travel in their customary modes on water, but as an obstacle to be crossed. In other words, the business of the boats was ranching or guano production, not carrying waterborne freight;

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which trade and travel was or might be conducted in the customary modes of travel on water at that time.

"(c) If the need should have arisen on January 4, 1896, the Lake could have floated and afforded passage to large boats, barges and similar craft currently in general use on inland navigable bodies of water in the United States.

"(d) The areas of the Lake which had a depth sufficient for the purposes in sub-paragraphs (b) and (c) above were not narrow or short channels, but were several miles wide, extending substantially through the length and width of the Lake, and covered an area of more than 1,000 square miles. A vessel could have traveled almost in a straight line from Monument Point located on the northwestern tip of the Lake to a point, where Silver Sand Beach is now located, at the southern edge."

the boats were sustained on the Lake from the proceeds of the ranching or guano production operation, not from their profits as carriers.

This may, perhaps, be deemed an unimportant distinction; it could be argued that whether a boat used to haul stock is owned by the rancher himself, or by some party whose business it is to haul stock, makes no difference. But there is, we suggest, a critical distinction. The actual situation is that the carriage described served the needs only of the limited number of people who owned the business operations, in connection with which such carriage was conducted. The Lake is an obstacle which, perforce, they must overcome. This, we submit, hardly demonstrates that the Lake has a practical usefulness to the public as a commercial highway.

Likewise, the fleets of boats which twice came on the Lake, not to engage in trade or travel, but to construct a railroad trestle and a solid landfill causeway across its waters, do not show practical usefulness. While on the Lake, these vessels were not instruments of commerce in the customary modes of trade or travel on water; they were construction equipment. After their work was completed, the steamboats, tugboats, and barges, aside from a few craft which continued to be used for regular inspection checks of the trestle and causeway, all left the Lake, for there was no traffic or other activity on the Lake requiring their presence.

The boats engaged in exploration or scientific study of the Lake are no more indicative or probative of

the utility of the Lake for trade or travel than are the Apollo expeditions to the moon proof of the existence today of interplanetary commerce. And of course the police patrol and rescue activities do not involve "commerce." Boating for recreational and pleasure purposes is similarly inapposite, since such uses do not involve trade or travel in the sense here pertinent.[12]

The actual uses cited by the Master are thus insufficient to show that the Great Salt Lake was navigable in fact on the date of Utah's admission to the Union. As we have shown, at that time the Lake was not, in its natural state, susceptible to practical commercial use. We thus contend that, measured by the proper yardstick, the Lake cannot be said to have been navigable in fact at the critical time, and the Master's conclusion to the contrary should not stand.

IV. THE GREAT SALT LAKE IS NOT NAVIGABLE IN LAW FOR STATE TITLE PURPOSES BECAUSE IT HAS NO INTERSTATE OR FOREIGN CONNECTION

The test of navigability for purposes of federal admiralty jurisdiction and commerce regulation embodies two elements: the waterway must be navigable in fact; and it must also form a part of a highway in interstate or foreign commerce. Our contention, which is supported by historical analysis, is that the same dual test must be satisfied for state title purposes. Thus even if the Great Salt Lake were found navigable in fact, it is

[12] The same would apply equally to excursion craft, if such are within the uses described in Conclusion of Law 9, R. 51. But see n. 9, *supra*.

not navigable in law because it has no interstate or foreign connection.

We have found no decision of this Court holding that in the state title area the interstate or foreign highway requirement also must be satisfied. Indeed, there are suggestions, by way of dicta, in several of the Court's opinions that this requirement need not be met to establish navigability for state title purposes (*e.g., United States* v. *Oregon, supra,* 295 U.S. at 14); and in one instance the Court sustained state title to portions of the bed of an interstate river system which were navigable-in-fact only intrastate, although without discussion of the question here raised (*United States* v. *Utah, supra,* 283 U.S. at 75). But because in our view the Court has not provided a clear-cut answer to this question, and because a historical analysis supports the argument here advanced, we submit that the interstate or foreign highway requirement applies with equal force to the state title area and must be met before a waterway may be deemed "navigable" for that purpose.[13] In view of our argument on this point, we except to the Special Master's ruling in Conclusion of Law 10 (R. 51) that navigability for state title purposes may be established even though the waterway in question "is not capable for use for navigation in interstate or foreign commerce."

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[13] We reserved and did not urge this point before the Special Master (Brief of the United States With Respect to the Navigability of the Great Salt Lake, p. 9) because of our judgment that only this Court should be requested to consider this issue in view of the opinions in *United States* v. *Oregon, supra,* and *United States* v. *Utah, supra.*

To begin with, the Great Salt Lake lies entirely within the State of Utah (Finding of Fact 5, R. 10). And the Lake has no navigable connection beyond Utah; although one of its tributaries, the Bear River, flows through Wyoming and Idaho before reaching the Lake, and vessels have traveled from the Lake a short way up and down the Bear, yet this stream does not provide water passage to any point outside Utah (Findings of Fact 12 and 24, R. 17, 24.[14] Since the territorial boundaries were never less extensive than the present state boundaries, these conditions have existed throughout the known history of the Lake. Thus if the rule which we here assert is applicable for State title purposes, the undisputed facts preclude a finding that the Lake was "navigable" at the time of statehood.

State ownership of lands underlying waterways within their boundaries derives from the soverign rights of the English Crown, to which the States succeeded, directly in the case of the original thirteen States, *Martin* v. *Waddell*, 16 Pet. 367, 410, 416, and under the equal-footing principle in the case of subsequently-admitted States, *Pollard's Lessee* v. *Hagan*, *supra*. Under English common law principles, the Crown owned only the beds of *tidal* waters—that is, waters within the ebb and flow of the ocean's tides. The governing precept was that the principal highways of water commerce should be treated as public assets and

[14] We note that the Bear might nonetheless be subject to regulation for commerce clause purposes if it were found that improvements could render it navigable interstate. See pp. 18–19, and n. 8.

immune from private ownership, so as to prevent interference with free use of those waters as commercial highways. But even though a waterway was substantial in size and plainly susceptible to commercial use, at common law its bed was not subject to public ownership by the Crown if it was non-tidal. See *Hardin v. Jordan,* 140 U.S. 371, 391–392; *Johnston* v. *O'Neill,* 105 Law Times Rep. 587, 597 (House of Lords, 1911).

The common-law rule that only tidal waters could be navigable—irrespective of navigability in fact—was both stated as and held to be the applicable rule for American law purposes in all early cases. *E.g., The Steamboat Orleans,* 11 Pet. 175, 182–183; *The Steamboat Thomas Jefferson,* 10 Wheat. 428. This Court soon concluded, however, that public control and ownership of the great rivers and inland lakes in this country was essential to effect the policy behind the common-law rule—to protect free use and public regulation of these waterways as commercial highways. See *Barney* v. *Keokuk, supra,* 94 U.S. at 337–338; *The Propeller Genesee Chief v. Fitzhugh, supra,* 12 How. at 454–459. But this admitted departure from the commonlaw rule was, until the *Utah* case, sanctioned only for the nation's great rivers and inland seas, which plainly constitute channels of interstate or foreign commerce and with respect to which the reasons undergirding the common-law rule are equally applicable. See *Illinois Central R. Co.* v. *Illinois,* 146 U.S. 387, 435–436; *The Propeller Genesee Chief* v. *Fitzhugh, supra,* 12 How. at 453–454; *The Montello,* 11 Wall. 411, 415.

Because Utah was a public land state, the federal

government originally held title to all lands within the territory, including the beds of both navigable and non-navigable waters. Most of this land was held in the government's proprietary capacity. Only land which the equal footing doctrine identified as an incident of state sovereignty, by analogy to the succession of the original states to the title of the Crown, was held "in trust" against the eventuality of Utah's admission to the Union as a state. *Pollard's Lessee* v. *Hagan, supra; Shively* v. *Bowlby, supra,* 152 U.S. at 26–28. All other lands remained in the federal government, unless expressly granted to the State by statute. For, except for what the equal footing doctrine required, they could not be made to pass by judicial construction. The Constitution reserves to Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, Sec. 3, Cl. 2.

The title of the Crown, however, was limited to navigable, *tidal* waters. The strictest observance of the equal footing clause would have limited the title of new states to similar waters. In fact, despite an initial insistence that the extension of federal commerce and admiralty authority to inland waters was made because property rights were *not* involved, *The Propeller Genesee Chief* v. *Fitzhugh, supra,* 12 How. at 458, the Court extended the doctrine of state ownership to all waters navigable under the early commerce and admiralty test—that is, to all navigable waterways which constituted part of an interstate highway of commerce. *Barney* v. *Keokuk, supra,* 94 U.S. at 338.

There is no need to consider whether that holding was mistaken, since Congress subsequently ratified it by passage of the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. 1301 *et seq.* In line with the original doctrine, however, that Act recognizes state title only to the beds of those bodies of water which were "navigable *under the laws of the United States* at the time such State became a member of the Union." 43 U.S.C. 1301(a) and 1311 (emphasis added). It recognizes no title to beds underlying *intrastate* waters, not navigable "under the laws of the United States." See *The Montello, supra; Poynter* v. *Chipman,* 32 Pac. 690 (Sup. Ct. of Utah, 1893); *In re Madsen's Petition,* 187 F.Supp. 411 (N.D. N.Y.); *Shogry* v. *Lewis,* 225 F.Supp. 741 (W.D. Pa); *Marine Office of America* v. *Manion,* 241 F.Supp. 621 (D. Mass.); *In re Builders Supply Co.,* 278 F.Supp. 254 (N.D. Ia). Title to the beds of bodies of water not navigable "under the laws of the United States"—i.e., which are not part of a highway of interstate or foreign commerce—did not pass from the United States to new states by reason of the equal footing doctrine. Since there is no other basis on which it might have passed, title to such lands, including the bed of the Great Salt Lake, remained in the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that on the date of Utah's statehood the Great Salt was not "navigable", either in law or in fact, and that therefore appropriate modifications should be

made in the relevant Findings of Fact and Conclusions of Law and in the Proposed Decree contained in the Special Master's Report.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
PETER L. STRAUSS,
WM. TERRY BRAY,
Assistants to the Solicitor General.
MARTIN GREEN,
Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT
(BEFORE THE SPECIAL MASTER ON REFERENCE)

BRIEF OF THE UNITED STATES WITH RESPECT TO THE NAVIGABILITY OF THE GREAT SALT LAKE

INTRODUCTION

The only question now before the Special Master is whether or not the Great Salt Lake is navigable. The State of Utah contends that it is; the United States contends that it is not. Should we prevail on this issue that would be an end of the case, since the sole basis of Utah's claim to the lands in dispute, whether now submerged or exposed, is that they were once part of the bed of a *navigable* body of water and, as such, passed to the State upon Utah's admission to the Union. On the other hand, if Utah prevails on the question of navigability, further proceedings will be necessary to determine other issues, notably whether

the State lost its original title by operation of the law of "reliction" as portions of the former lake bed became exposed.[1]

Two propositions set the framework for the consideration of the navigability of the Great Salt Lake. The first is that the burden of proof is on the proponent of navigability—here Utah. See *Harrison* v. *Fite,* 148 Fed. 781, 785 (C.A. 8); *Iowa-Wisconsin Bridge Company* v. *United States,* 84 F. Supp. 852, 867 (C. Cls.). The second proposition is that "[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts." *United States* v. *Holt Bank,* 270 U.S. 49, 55–56; *Brewer-Elliott Oil and Gas Co.* v. *United States,* 260 U.S. 77, 87; *United States* v. *Utah,* 283 U.S. 64, 75; *United States* v. *Oregon,* 295 U.S. 1, 14. It follows that the decisions of the Supreme Court of Utah taking judicial notice of the navigability of Great Salt Lake,[2] cannot be deemed to have established the Lake's navigability for our purposes. The question is, rather, whether the State of Utah, in the recent proceedings before the Special Master, has succeeded in showing that Great Salt Lake is a navi-

[1] As we read Utah's brief (pp. 1–4), there is no dispute between the parties on this point. The State's insistence (Br. p. 2.) that navigability is a "preliminary" issue, not a "basic" one, is presumably no more than an assertion that it must prevail on this question.

[2] *Robinson* v. *Thomas,* 75 Utah 446, 286 Pac. 625; *Deseret Livestock Co.* v. *State,* 110 Utah 239, 171 P. 2d 401.

gable body of water according to the rules recognized and applied in federal courts.

We turn first to those governing legal standards, concluding, in sum, that navigability as a basis for a State claim to submerged lands requires a finding that the body of water was used, or at least useable, at statehood as a commercial highway. We then undertake a detailed canvas of the evidence presented at the hearing. The historical materials, we find, reveal very little actual navigation of the Lake and none of the relevant kind at the critical time. Finally, we deal with the suggestion that the Great Salt Lake was, and is, *potentially* an artery of commerce.

GOVERNING LEGAL PRINCIPLES

At the outset, it may be useful to restate how the issue of navigability arises in the case. Utah's claim to the original bed of the Great Salt Lake (whether now submerged or exposed) ultimately rests upon the proposition that these lands passed to the State upon its admission to the Union. This results, it is said, from the operation of the "equal footing" principle which, as construed in *Pollard's Lessee* v. *Hagan*, 3 How. 212, and subsequent cases, requires that the newly admitted States be accorded the same property interest in submerged lands as was enjoyed by the thirteen original States as successors to the rights of the British Crown. And so we are finally led to the English law which viewed the beds of the great navigable rivers of the realm as belonging to the sovereign, rather than to the riparian landowners.

The governing notion apparently was that the principal highways of water commerce—which in England are the tidal rivers—ought to be treated as public assets, immune from the claims of private landowners. That rationale is, of course, equally applicable in this country. It is merely an anomaly of our constitutional history that, here, the public interest in navigable waters, as such, is administered by the federal government (to which the Constitution delegates admiralty and maritime jurisdiction and power to regulate interstate and foreign commerce), while the public interest in excluding the riparian owners from the underlying lands is manifested in State custody of the beds (because the original States, rather than the Union, immediately succeeded to the sovereign prerogatives of the British Crown and never ceded their rights in the water bottoms to the national government, see *Martin* v. *Waddell,* 16 Pet. 367, 410, 416). The fact that, in the United States, one sovereign regulates navigation and another owns the beds does not suggest different tests as to what constitutes a "public" river. On the contrary, since the overriding reason for keeping the beds out of private ownership is to prevent interference with the free use of navigable waters as commercial highways, see *Barney* v. *Keokuk,* 94 U.S. 324, 338, one would suppose that a State claim to submerged lands should attach only with respect to the beds of rivers or lakes the waters of which are subject to the federal navigational servitude.

That would certainly be the rule if the English example had been followed strictly. For the common law conceded to the Crown only the beds of navigable *tidal* waters, which were of course arms of the sea subject to the jurisdiction of the Admiralty and arteries of foreign commerce. To be sure, this equation of navigability with tide-water was early found ill-suited to the geography of America and rejected, both as a restriction on the federal admiralty jurisdiction (see *The Propeller Genesee Chief,* 12 How. 443, 454–459), and as a test of navigability for property purposes as well (*Barney* v. *Keokuk, supra,* 94 U.S. at 337–338). But the single federal standard that seemed to emerge was, in the words of the *Genesee Chief,* waters "on which commerce is carried on between different states or nations."

In light of this history underlying State ownership of the beds of the navigable waters, the question arises whether the rule is operative with respect to lands under rivers or lakes which are not within the federal admiralty jurisdiction or subjected to federal regulation under the Commerce Clause because they do not form part of a navigable interstate or international commercial highway—and are, accordingly, not "navigable waters of the United States." See *The Daniel Ball,* 10 Wall. 557, 563; *The Montello,* 11 Wall. 411, 415; *Moore* v. *American Transportation Company,* 24 How. 1, 39; 33 U.S.C. 2.10–5(a). Although there is of course no constitutional obstacle to recognizing State ownership of the beds of wholly land-locked intrastate waters, confining the doctrine to channels of interstate

or foreign commerce would serve the advantages of a single uniform federal test of navigability which, in practice, would allow public ownership under all important water highways. If the matter were open, we might invoke that limitation here, since the Great Salt Lake has no navigable connection beyond Utah. However, because we read the opinions in *United States* v. *Utah, supra,* 283 U.S. at 75, and *United States* v. *Oregon, supra,* 295 U.S. at 14, as foreclosing the argument, at this juncture, we merely preserve the point in the event it seems appropriate to urge reconsideration of the *Utah* and *Oregon* decisions when the Special Master's report is before the Court.

We now turn to the test of navigability on the assumption that an interstate connection is *not* essential for present purposes. The classic definition of navigable waters occurs in *The Daniel Ball, supra,* 10 Wall. at 563:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. * * *

Although that was a case construing the Commerce Clause, the definition just quoted is almost invariably cited in both admiralty cases (*e.g., In re Garnett,* 141 U.S. 1, 15), and cases involving State title (*e.g., United States* v. *Utah, supra,* 283 U.S. at 76). Like Utah (see Br. 8–10), we accept the passage as generally stating the applicable law.

What *The Daniel Ball* teaches is that navigability in fact, in federal law, is more than ability to float a vessel. A body of water is navigable in fact only if, in its natural condition, it is useable as a "commercial highway." The last expression carries several relevant implications:

> That the movement is a purposeful aspect of the flow of goods or passengers from one point to another, rather than, say, the aimless cruising of pleasure boats or even the scheduled round trips of a sightseeing or excursion vessel;
>
> That the commerce involved is, at least potentially, of substantial volume and frequency;
>
> That the use of the body of water for transporting goods or people is practical, including, presumably, physical possibility and economic feasibility.

These characteristics have been listed as ingredients of navigability in all contexts. But, whatever the appropriateness of demanding so much to establish admiralty jurisdiction, or congressional power under the Commerce Clause, it is clear that these are the enduring criteria of navigability in connection with determining a State claim to the bed of an inland lake or river. Thus, a navigable body of water in this sense has been defined as a waterway which has "capacity for practical and beneficial use in commerce" (*Oklahoma* v. *Texas*, 258 U.S. 574, 591), or, more directly, as "a channel for useful commerce." *Brewer-Elliott Oil and Gas Co.* v. *United States, supra*, 260 U.S. at 86; *United States* v. *Holt Bank, supra*, 270 U.S. at 56; *United States* v. *Utah, supra*, 283 U.S. at 76. The matter is well summed up in the landmark opinion

of Judge Hook in *Harrison* v. *Fite*, 148 Fed. 781, 783 (C.A. 8), approvingly cited by the Supreme Court in several decisions (*e.g.*, *Oklahoma* v. *Texas*, *supra*, 258 U.S. at 591; *United States* v. *Oregon*, *supra*, 295 U.S. at 23):

> To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable, a water course must have a useful capacity as a public highway of transportation. * * *

It only remains to stress one aspect of the test of navigability which is unique to the State title context: that is the *time* when the water course must be navigable. The time is *not* the present, as it is for the pur-

pose of admiralty jurisdiction. See *The Robert W. Parsons,* 191 U.S. 17, 28. Nor may we follow the generous test applicable to the exercise of congressional powers under the Commerce Clause, which treats as subject to regulation waters which were once navigable but are no longer (*e.g., Economy Light Co.* v. *United States,* 256 U.S. 113, 123–124), or which only recently have become passable (*e.g., Philadelphia Light Co.* v. *Stimson,* 223 U.S. 605, 634–635), and, also, streams which are not now, and never have been, navigable, but may become so in the future by improvements (*e.g., U.S.* v. *Appalachian Power Co.,* 311 U.S. 377, 409; and see 33 U.S.C. 2.10–5). For the purpose of determining a State claim to water bottoms the inquiry as to navigability is limited to the date of the State's admission to the Union; all else is irrelevant. *Shively* v. *Bowlby,* 152 U.S. 1, 18, 26; *United States* v. *Utah, supra,* 283 U.S. at 75; *United States* v. *Oregon, supra,* 295 U.S. at 14; *Oklahoma* v. *Texas, supra,* 258 U.S. at 591, 594; see *United States* v. *Appalachian Power Co., supra,* 311 U.S. at 408.

An important corollary of the rule that navigability must be shown at Statehood, not at some future time, is that the water course should be judged in its natural state. Future improvements that would remove obstacles to commerce or otherwise improve navigability are not relevant.

This is not to say that actual use of the river or lake as an artery of commerce at the date of the State's admission is essential. As *United States* v. *Utah, supra,* 283 U.S. at 82, explained: "where con-

ditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved." Thus, one may judge navigability by assuming a natural development of the area and considering whether the stream or lake, given its geographic setting, its dimensions and direction, will likely become a commercial highway. But, the potential of a water course as an artery of commerce may be obviously lacking from the beginning, despite its ability to float a large vessel. And subsequent history will often be relevant in confirming that appraisal.

ACTUAL NAVIGATION ON THE LAKE

In an appendix to this brief (App. 2, *infra*, pp. 43–59)[3] we have detailed every known instance of navigation on the Great Salt Lake.[4] We submit that a careful analysis of this history shows that the Lake never served as a commercial highway, certainly not since Statehood. We turn to that demonstration.

The evidence relative to boats plying the Lake reveals uses in seven categories: (1) pleasure; (2) ex-

[3] An abbreviated, but complete, listing in tabular form follows the narrative. App. 3, *infra*, pp. 60–63.

[4] Two boats referred to in the evidence are not listed: these are the "Rosie Brown," built by Thomas G. Brown, and named for his daughter, and the "LaVon," built by T. G. Brown, the son of Thomas Brown. The "Rosie Brown" was used to "haul salt from beds somewhere along the [Bear] river to the railroad at Corrine"; the "LaVon," was "a motor launch capable of carrying 25 passengers at a time, and used for pleasure cruises and hunting trips." Both boats are omitted because they seem to have been used only on the Bear River. The evidence does not reveal when these boats were used. Ex. D–3, p. 270.

cursions; (3) the hauling of sheep and cattle; (4) the construction of railroad lines across the lake; (5) surveys, explorations, and scientific studies; (6) commercial trade and (7) miscellaneous. In addition, the evidence reveals only the existence, but not the use, of a number of boats, and these may be assigned to an eighth category, that of "use unknown." [5]

1. The first category, that of pleasure boats, contains the greatest number of vessels. Undoubtedly, such boats as may have been on the Lake and which are not referred to in the evidence introduced in this case would be rowboats, sailboats and gasoline launches falling into this category. And the boats only generally referred to—the forty yachts mentioned in Item 60, the unknown number of boats which participated in the regatta mentioned in Item 73—all of these appear to have been private craft used solely for recreation and pleasure.

It should here be noted that (with perhaps one exception mentioned later) the only boats using the Salt Lake County Boat Harbor pictured in Exhibit P–11, and occasionally referred to at the hearing, were pleasure boats. The harbor was not built until the 1930's and in 1949, only about ten years after its completion, was found to have been neglected, "and not satisfactory for the 50 boats moored there." Ex. D–4, Item 00, pp. 7 and 8. This finding was made by the United States Army Corps of Engineers, which at the direction of Congress was conducting a study to de-

[5] Appendix 4, *infra*, p. 64, is a table indicating into which category the defendant believes should be placed each of the instances listed in Appendices 3 and 4.

termine whether or not the Government should participate in a project to improve the harbor. The final recommendation of the Corps was that improvements should not be undertaken.

Ten years later the harbor was again inspected by an agent of the federal government, this time in connection with a proposal that Great Salt Lake be made a national monument. According to this report, conditions there had deteriorated (Ex. D–4, Item D, pp. 6 and 7):

> Located a mile or so east of Sunset Beach, this harbor is apparently operated by Salt Lake County. It is certainly the largest, and possibly the only, harbor on the lake developed for the use of private pleasure boats. The harbor consists of a small dredged channel with dilapidated boat shelters along one side. The silting in this channel causes a serious maintenance problem. At the time of our visit a scoop was in operation cleaning out muck clogging the channel entrance.
>
> The harbor facilities presented the same general appearance of decay noted elsewhere. About 30 boats, ranging from rowboats to large cabin cruisers, were tied up in the boat sheds. Some of the boats were complete wrecks. All showed the ravages of erosion caused by the high salt content of the Great Salt Lake waters. The boat houses and other structures are complete shacks, almost beyond repair. The only exception was the boat house belonging either to the U.S. Navy or Coast Guard.
>
> If this harbor is any indication, Great Salt Lake is not a popular boating area. Further

> evidence of this is the fact that no boat of any kind was seen on the lake during the entire study.

The lack of pleasure boats on the Lake was not a phenomenon confined to 1959; in 1902, in a geography book apparently designed to be used in the Utah public school system, the statement is made of Great Salt Lake that (Ex. D–3, p. 127):

> Though the air is very invigorating and healthful on account of the salt spray, there is very little sailing upon the lake because of the unpleasant effect of the salt which crystallizes upon the body and clothes in thick scales from every drop of water which strikes them. Salt water soon destroys leather and rubber and causes disagreeable cracks in the skin, when it is not washed off by fresh water. The waves are very heavy and roll lazily even in severe storms.

But these comments on the harbor are a digression: even were the harbor in excellent condition, and used by a fleet of 500 pleasure craft, that use for that purpose would not under federal law permit a determination that the Lake is navigable for the purposes of vesting in the State title to the bed thereof.

2. The second category is of boats used for excursions: thirteen boats devoted to this activity have been identified in the evidence. The excursion trips appear for the most part to have lasted from twenty minutes to three hours, but sometimes boats were hired for tours of longer duration.

Obviously, to be a highway of trade and travel, a body of water ought to lead somewhere, and lend itself to being used by traffic to get from one end to the

other. A boat which ventures forth on a 2,000 square mile body of water for twenty minutes, and then without having in the interim discharged freight or passengers, returns to the place from which it started, cannot be said to have been engaged in "useful commerce", or to have demonstrated the Lake's "useful capacity as a public highway of transportation." If the existence on a body of water of excursion boats, or any boats hired for pleasure, could be construed to establish the navigability of that body of water, then the Lake in the Public Garden in Boston, plied regularly in the summer by a fleet of swan boats, would be a navigable body of water, as would countless other small ponds in parks throughout the country.

3. The third category is of boats used to haul cattle and sheep. Nine such boats can be identified in the evidence; in every case save one where there is information on the subject, however, it appears that the boats used to haul the sheep and cattle were the property of the owner of the stock, and that the hauling was done, not by a carrier for the purpose of making money by the act of carriage, but by a person or organization whose business was ranching and for whom the carriage of the stock to the mainland from either Antelope or Fremont island was only one step in an operation not centering on the use of the Lake as a highway for trade and travel in their customary modes on water. In other words, the business of the boats was ranching, not carrying waterborne freight; the boats were sustained on the Lake from the proceeds of the ranching operation, not from their profits as carriers.

This may, perhaps, be deemed an unimportant distinction; it could be argued that whether a boat used to haul stock is owned by the rancher himself, or by some party whose business it is to haul stock, makes no difference. But, there is, we suggest a critical distinction. The actual situation is that the carriage described served the needs only of the limited number of people who owned ranching operations along the shores of the Lake (and, indeed, the evidence shows that, in the entire history of the Lake, the only ranching operations which have used boats have been those of four or five people or organizations[6]—who have used Fremont or Antelope Island for grazing their sheep or cattle). This, we submit, hardly demonstrates that the lake has a "practical usefulness to the public as a public highway."

What is true of the boats which were apparently owned by the ranchers themselves is also true of the one boat used to haul stock that was not owned by a rancher: this was Mr. Backman's boat which was used—and presumably especially hired for this—to carry sheep to Fremont Island for the owners of that island. One sheep boat for hire does not make an artery of commerce; especially if it was only hired by one person—the owner of Fremont Island—and was useful only in one activity—the hauling of sheep to and from that island.

[6] These are, on Fremont Island, the Millers (up to 1884) and the Wenners (from 1884 on); on Antelope Island, the Mormon Church, originally, then (apparently) White and Sons, and finally, the Island Improvement or Island Ranching Company, which, in 1967, sold its land to the State of Utah.

4. What has been said of the inability of the limited use of boats for hauling stock to show the "practical usefulness" of the Lake to the public as a commercial highway applies with even more force to the fleets of boats which twice came on the lake, not to engage in trade or travel, but to construct across its waters first, in 1902, a railroad trestle, and then in 1957, a solid landfill causeway. While on the lake, these vessels were not instruments of commerce in the customary modes of trade or travel on water; they were construction equipment. After their work was completed, the steamboats, tugboats and barges, aside from a few craft which continued to be used for regular inspection checks of the trestle and causeway, all left the lake, for there was no traffic or other activity on the lake requiring their presence.

5. The fifth category, which consists of boats used to explore the Lake, or of boats which once were or now are engaged in scientific study on its waters, no more are indicative or probative of the utility of the lake for trade or travel than are the Apollo expeditions to the moon proof of the existence today of interplanetary commerce.

6. The sixth category consists of boats which appear in fact to have used the lake as a highway for commerce in the customary mode of trade and travel on water.

There are seven such boats: the first was the "Timely Gull" (Item 7), which was on the lake from 1854 to 1858, and appears to have been used not only

to haul church cattle to and from Antelope Island, but also to carry and trade in cedar, salt, and slate flagging.

The next two boats, the "Pioneer" (Item 15) and the "Kate Connor" (Item 16) both belonged to General Patrick Connor, and were both used in 1867 and 1868 to transport railroad ties from the mountains south of the lake eighty-five miles to where the Union Pacific Railroad was being built on the north of the lake, "where there was no timber (nor, in fact, anything else)." Ex. P–8, p. 17. How long the "Pioneer" was thus used is not known (although the railroad, of course, was completed in 1869), nor is anything known of its ultimate fate. The "Kate Connor" was not a financial success. Ex. P–8, p. 17. Although there is a reference to the "Kate Connor's" having sunk with a load of ore in about 1871 (Ex. P–8, p. 18B; Ex. D–3; p. 192), the journal of Christopher Layton reveals that the boat was bought by him in 1872 and used for a number of years thereafter for hauling sheep to Antelope Island for the church. Ex. D–3, p. 69. The "Kate Connor," therefore, has either been confused with some other boat which did sink, or after sinking, was raised and restored to use. Like the "Pioneer," its end is unknown; Alfred Lambourne, on Gunnison Island in 1895, mused on a piece of wreckage cast up on the shore and used for firewood (Ex. D–3, p. 140):

> Perhaps the relic that fed our flames was a bit of the old *Pioneer,* or it may have come from the *Star of the West.* Maybe it was a piece

from the ribs of the *Kate Connor,* whose skeleton lay for several years at one of the river mouths; or it may have come from the Stanbury scow, the *Salicornia;* or from the *Pluribustah,* or other boat with equally *un*euphonious name.

The next use of the lake as a highway for trade or travel also involved the transportation of railroad ties to the site of the construction of the railroad. The ties, however, were not carried in a boat; rather, lashed together, the ties constituted a raft (Item 18 in our list of boats). Given its purpose, this raft of ties crossed the Lake only once, of course, and it was never followed by a second. Ex. D–3, p. 191.

This brings us to the most famous boat ever on the lake, the "City of Corinne" (Item 19). It was launched in June, 1871, and was intended to be used for carrying passengers and freight, but its life in this capacity was less than one year. By June 1872, it had been converted into an excursion boat. In 1881, it was moored permanently at Garfield Landing, and was used as a hotel.

The last two boats which were used to any extent for trade and travel were both used by the Miller family: The "Lady of the Lake" (Item 32) in the 1880's, in addition to hauling sheep to and from Fremont Island, was used for hauling ore, salt and cedar posts. Its use by the Millers ceased well before 1891. Another boat (Item 34) built and used by the Millers carried salt from various salt works around the lake to a railroad connection. The exact dates of this use are unknown; it was probably in the 1880's.

These seven boats comprise the lake's entire commercial fleet, and the first five, at least, were in use for purposes of trade and travel for very brief periods of time. Only one of them, the "City of Corinne" had regularly scheduled passenger and freight service across the lake, and this service lasted for less than a year.

7. The seventh category is of boats devoted to miscellaneous uses: the rowboat (Item 9) which took Brigham Young to Antelope Island in 1856, while the team "forded the water to the island"; the "Star of the West" (Item 15) which once carried a "cargo of Salt," and which another time was used to supply water to a party surveying the lake, it having "no other known claim to fame," (Ex. D–3, p. 187); the four boats (Item 61) which in 1935 searched for a plane downed on the lake, and one of which was thereafter given to the Salt Lake County Sheriff's office; the LCI used for hauling guano (Item 66), which is the one boat other than a pleasure boat which may have used the Salt Lake County Boat Harbor, and which is not included among the boats in category 6 because it is subject to the same objection against being considered as engaged in trade or travel as are the boats used for hauling stock; the boat (Item 69) used by John Clawson Silver as a "promotional and goodwill ambassador"; the barge (Item 70) used by Mr. Silver to haul salt crystals "not to sell" but just "for decoration and pleasure"; and the "crash boat" (Item 77) supposedly operated on the Lake by the Hill Air Force Base. Also included here are the boats

(Items 71 and 72) used by the Sanders Brine Shrimp Company for harvesting brine shrimp from the lake.

8. All that need be said of the boats in the last category is that the evidence discloses that they were on the lake, but reveals nothing about their uses.

Thus, the evidence shows that in the 145 years since the discovery of the lake, there have been on its surface but seven vessels unmistakably engaged in trade or travel in the customary mode of trade and travel on water. The trade conducted by these vessels was sporadic; their careers were short. The only one of these vessels to carry passengers and freight on a regular schedule was in service for less than a year. A correlation of the dates when these seven boats were on the lake with the graph (Ex. P–2) showing the levels of Great Salt Lake from 1850 to 1968 (see Appendix 8) reveals that all these boats were launched at a time when the level of the lake was much higher than it was on the date of statehood in 1896. Indeed, the evidence indicates that all commercial traffic on Great Salt Lake had *ceased* by 1888, well before Utah became a State, and during a period when the level of the lake was higher than it has ever again reached.

And not one true use of the lake as a highway for trade and travel has occurred *since* the date of statehood. On the basis of actual use for trade and travel, the lake obviously is not, and was not on the date of statehood, navigable as a matter of fact.

SUSCEPTIBILITY OF THE LAKE TO USEFUL NAVIGATION

No doubt sensitive that the actual record of navigation on the Great Salt Lake may well be deemed in-

sufficient, the State seeks to bolster its case by invoking the rule that, in some circumstances, navigability may be established by merely showing that at Statehood the water course was "susceptible of commercial navigation" (see Utah Br. 13). We now turn to that claim.

It is important to stress the limitations of the rule. As we have already noted, the feasibility of future artificial improvements to the water course—or indeed, the predictability of natural changes—is *not* to be taken into account in assessing navigability for the purpose of a State claim to submerged lands. The law is simply that actual navigation at Statehood need not be shown if the water course, in its then state, was susceptible of commercial navigation but was not yet so used because of prevailing "conditions of exploration and setlement." Applying that standard, we submit the Great Salt Lake does not qualify.

1. Indeed, since the Lake was discovered (1824 or 1825) more than 70 years before the date of Utah's admission to the Union (1896) and settlement of the area had largely occurred by that time, it is doubtful whether the "susceptibility" rule is appropriately invoked at all. Ever since 1850 there have been sizeable settlements near the Lake. Salt Lake City, of course, was the first, and in 1852 Stansbury remarked of it (Ex. D–3, p. 4):

> The founding, within the space of three years, of a large and flourishing community, upon a spot so remote from the bodes of man, so completely shut out by natural barriers from the rest of the world, so entirely unconnected by watercourses with either of the oceans that

> was the shores of this continent—a country offering no advantages of inland navigation or of foreign commerce, but, on the contrary, isolated by vast uninhabitable deserts, and only to be reached by long, painful, and often hazardous journeys by land—presents an anomaly so very peculiar, that it deserves more than a passing notice.

In 1856 there were over 77,000 people in the Territory of Utah (Ex. D–3, p. 24), most of them undoubtedly in the vicinity of Salt Lake City, and fifteen years later the hotels of Salt Lake City were accommodating 1,515 visitors (Ex. D–3, p. 25). By 1890 the total population of Utah was 207,905 (Ex. D–3, p. 29), presumably most of it centered then where it is now, in Salt Lake, Davis and Weber Counties, on the eastern side of the Lake (Ex. D–3, pp. 168 and 280)—which in 1960 had 558,539 residents (Ex. D–3, pp. 281 and 282).

In the circumstances, it is plain that the limited use of the Lake before Statehood cannot be attributed to the undeveloped character of the area. As the history of the Lake since 1896 sufficiently shows, time has not turned it into a useful commercial highway. The fact is that the Great Salt Lake was never "susceptible" of filling that role.

2. It is, undoubtedly, the physical situation of the Lake which is chiefly responsible for the incredibly insignificant use made of the Lake over the last 145 years. The Lake lies in a "vast, flat, sterile basin" (Ex. D–3, p. 165). It is a residue of an ancient sea, and occupies a shallow depression in the otherwise re-

markably flat plain which once was the bed of that sea (Ex. P–31, p. 27). It is the drain for a great area, the Lake itself having no outlet. When the surface of the Lake is at 4,195 feet above sea level, the maximum depth of the Lake is about 25 feet; (Ex. D–2) the *average* depth of the Lake, however, is much less. Most of the shore of the Lake has a slope of less than 1 foot in 1,000 feet (D–4, Item 00, p. 2).

Thus, all around that portion of this great flat basin covered by the waters of the Lake stretch huge expanses of smooth, flat, salt-impregnated lands not covered by the waters of the Lake. The map which accompanies the stipulation in this case, and which shows the "reliction lands", well illustrates the extent to which the flats separate the water of the Lake from usable dry land. The flatness and shallowness of this closed basin (that is, a basin without an outlet) have a number of consequences, two of which (each being the corollary of the other) are to make the shores of the lake extraordinarily desolate, and access to the Lake extremely difficult. As Dale L. Morgan wrote, "Save only for the southeastern beaches at the base of the Oquirrhs, it [the lake] is everywhere bulwarked with mud morasses and salt marshes which have made is nearly inaccessible and have done much to preserve its atmosphere of desolate strangeness." Ex. D–3, p. 167.

There can be no question that the Lake has, in fact, preserved its desolate strangeness. The "bleak and naked shores, without a single tree to relieve the eye * * *" which Captain Stansbury saw in 1849 are

still as bleak and naked as ever. In 1861, Richard F. Burton, the famed world traveler, described the western side of the Lake as "a perfect desert—a salt and arid waste, of clay and sand, with the consistence of mortar when wet, which cannot boast of a single stream; even the springs are sometimes separated by 'jornadas' of seventy miles." Ex. D–3, p. 61. In 1959—almost 100 years later—a National Park Service reconnaissance study to determine the potentialities of Great Salt Lake as a national park or monument stated that "the entire western shoreline is a desolate inaccessible wasteland of salt flats." Ex. D–4, item D p. 4. A guidebook to the State of Utah, written in 1965, reports that "for fifty miles north of Salt Lake City, white mud flats and marshes of the Inland Sea stretch desolate and forbidding beneath the mighty wall of the Wasatch Range. The sea itself has retreated westward, as if exhausted from countless ages of beating against the impregnable mountain rampart; now it lies brooding in solitude, far from the pleasant lands that men prefer. Not many people come into intimate contact with Great Salt Lake, for it is too remote, too well protected by its shield of encircling mud and marshes." Ex. D–3, p. 165.

And, indeed, the map of the general areas of the lake introduced into evidence by the plaintiff—Ex. P–1—shows how well the lake's encircling bogs, marshes and flats fend off intruders. Except for Lakeside on the west shore of the lake—a spot inhabited by perhaps fifty people who maintain the tracks of the Southern Pacific Railway—there are no settlements or com-

munities of any kind immediately bordering on the lake. In fact—and again with the exception of the fifty-peopled Lakeside—there are absolutely no communities at all anywhere near the western and northern shores of the lake throughout all that vast area from Grantsville, which is about seven miles from the south shore of the lake, along the western and northern shores of the lake over to Brigham City, which is over twenty miles from the present waterline of the lake on its eastern shore. No settlements, communities, or towns of any kind appear on plaintiff's Exhibit 1; instead, what appears on the map for this area are a bombing and gunnery range, the Great Salt Lake Desert, a wildlife refuge, extensive salt flats, and an abandoned salt plant. Or, to put what the maps shows into the words of Dale L. Morgan: "Men have made themselves at home only along the southern and eastern shores of the lake. Except along the old route of the Central Pacific over the Promontory summit, and around the north shore, which was finally abandoned in 1942, and along the Lucin Cutoff, with its service points and sidings, the northern and western shores of the lake are almost completely uninhabited." (Ex. D–3, p. 168.)

But even along the southern and eastern shores of the lake, there are no settlements immediately adjacent to the water: all of the centers of habitation here are separated from the lake by from five to twenty miles of bogs, marshes and flats. Exhibit D–1, showing the southern portion of Antelope Island, and the shores of the lake near the old Saltair Resort, graphically

depicts the salt flats which are as characteristic of the eastern and southern shores of the lake as they are of the western; as an 1892 guidebook stated with respect to a beach at that time about six miles from Syracuse: "like the entire east shore, this place is too flat and the bottom too muddy for fine bathing." Ex. D–3, p. 114. The small communities of Hooper, Roy, Clearfield, Syracuse and Kaysville; the large communities of Brigham City, Logan, Ogden and Salt Lake City: all are from five to twenty miles from the salt water. (Ex. P–1; Ex. D–2; Ex. D–3; p. 169; Tr. p. 254.) Says the same 1892 guidebook: "The nearest point to the lake from Salt Lake City is about ten miles distant, but it is almost inaccessible on account of the boggy character of the ground." (Ex. D–3, p. 113.)

It is but one aspect—although in this case a very important aspect—of the general inaccessibility of the lake resulting from the flatness and gradual shelving of the basin in which it is located, that it is unusually difficult to get boats from dry land across the boggy marshes into floatable water. References to this difficulty abound in the literature on the lake, beginning with the Mormon settlers who in 1848 explored the lake in their skiff on wheels, the "Mud Hen." They found, after rowing down the Jordan River to the lake, that (Ex. D–3, p. 53):

> The Jordan suddenly spread out without leaving any channel that would float our boat. We stepped out and drew our boat four miles, water varying from one to four inches, bottom sandy, covered with two or three inches of slime or soft mud; we did not discover a living thing

> in the water; water fowl in great abundance. Got aboard and steered for the first island (Antelope) hauled our boat over a bar one half mile, and when one and a half or two miles off the island the water again shoaled so that our boat struck bottom.

All through the course of their journey, they were obliged to haul their boat one, two or three miles to get into the eight or so inches of water needed to float it (Ex. D–3, p. 54); and when finally they returned to Salt Lake City, they "got into shoal water and when within one and a half mile of land ran aground," upon which "each one took his gun and provision and walked to land." (*Ibid.*) After completing the trip, one of the members of the party, Brother Hambleton, "suggested, what we considered a very appropriate and characteristic name for the lake, *viz.*, 'the briny shallow' in contradistinction to the 'briny deep.'" Ex. D–3, p. 54.

Shallow water and the constant running aground of his yawl and skiff plagued Stansbury during his survey of the Lake in 1850. Approaching the Lake from the Jordan River, he found, as had the party on the "Mud Hen" before him, that the "channels became less defined and more shallow as we advanced" (Ex. D–3, p. 7.) "We were therefore obliged to unload the boat entirely * * *. After six hours of severe labour, we at length succeeded in reaching water that would float our little craft * * *." (*Ibid.*) Later "a line of soundings was run until midway, when the boat grounded" (Ex. D–3, p. 9). "The skiff was sent ahead with an officer, but it was soon left on

the flat, and the party waded through soft mud and water to the shore" (Ex. D–3, p. 9). "Starting from the springs with the boats, we attempted to make our way to the point where the eastern range seemed to terminate; but the water was so shallow that it was impracticable. After many fruitless attempts, the boat was brought as near the shore as possible, part of the baggage loaded into the skiff and pushed toward the land. It was impossible, however, to bring even this light barque nearer than within a quarter of a mile of the beach, and the luggage was transported to shore on our shoulders." (Ex. D–3, p. 12). "Moved again today, with the intention of encamping at the head of this arm of the lake, but the water became so shallow that not even the skiff would float, and we had to resort to the usual process of transporting beds and baggage on our backs to the shore." (Ex. D–3, p. 14.) "Anchoring our boat to keep her from drifting off, we waded some half-mile to the shore, and proceeded nearly three miles inland on our bare feet, over a sandy flat, and plunged through thick, oozy mud nearly knee-deep until we reached the growth of reeds we had seen from the boat." (Ex. D–3, p. 16).

Further to catalogue here the instances supporting Stansbury's statement that he was "continually baffled by shoals, which could not be seen until the boat grounded upon them" (Ex. D–3, p. 21), is not necessary; suffice it to conclude with Stansbury's remark, when a portion of his party using the skiff was for a time lost because of a storm, "The loss of the skiff is severely felt the nature of the shore being such that

the large boat, when loaded, cannot, in many places, approach within two or three miles of the land, and the lighter vessel is therefore indispensable." (Ex. D–3, p. 19).

And again, a hundred years later, the situation was still the same. At a public hearing held in Salt Lake City on July 10, 1946, to consider the advisability of providing a harbor for light draft vessels on Great Salt Lake, Dr. Thomas C. Adams said (Ex. D–4, Item QQ, p. 15):

> The particular needs of boat operators are for deep water, protected anchorage and tying space of ample size, and with utilities and services customarily required at small harbors. On Great Salt Lake they need, in effect, access to the Lake which in its natural stage is surrounded insofar as boat operation is concerned with an almost impenetrable barrier consisting of broad continuous belt, a very gently sloping, soft, sandy beach and adjoining shelves. Boats of any consequence cannot be operated, cannot be maintained or outfitted, or even placed in the water under such circumstances.

Dr. Adams' testimony is of particular significance because of his special knowledge of the Lake; Dale L. Morgan, in 1946, described him as "an engineer long concerned with the lake and as commodore of the Great Salt Lake Yacht Club [he] has an unequaled fund of information about the lake which he has been at pains to place at my disposal." (Ex. D–3, p. 214.)

Another consequence of the physical situation of the Lake—its being in a closed basin, without an outlet—

is that the level of the Lake is subject to marked fluctuation. (Ex. D–3, pp. 274 to 278). And, since the basin in which the Lake is located is so flat, the fluctuations in the level of the Lake result in the covering or uncovering of large areas of lands. This condition further thwarts use of the Lake. An example of this is what happened after the reconstituted Great Salt Lake Yacht Club started to use the pier at Saltair in the late 1920's (Ex. D–3, p. 211):

> But that deadly lake level, which so often had disastrously intervened upon boating activities, either by rising to flood shore facilities or by so far withdrawing from them as to render them useless, once again began its assault upon the enthusiasm for yachting. The facilities at Saltair, between 1928 and 1935, became increasingly less satisfactory as the lake shrank upon itself. It was difficult to reach the boats, for the increasing shallowness of the water necessitated anchoring farther and farther out from the pavilion. And even when the water was deep enough to allow the boats to come to the pier, there was not protection from waves and storms.

In fine: the shallowness of the Lake, the difficulty of access to it, the great distances from the far water line of the Lake to depths capable of floating a boat, the inhospitable nature of the great bogs, marshes and salt flats surrounding the Lake, the desolateness of the immediate environs of the Lake, are physical features of the lake which negative its susceptibility to use as a highway of commerce; these physical features coupled with the facts that there are no com-

munities along the shores of the Lake, although the Lake is within twenty miles to half the population of Utah, and that in the 145 years that people have been living near the Lake, it has been but sparsely used, there having been no true commercial use of the Lake after the date of Statehood, nor to any marked extent for twenty-five years prior to the date of Statehood; all this compels the conclusion that the Lake, as a matter of fact, was not navigable at the time of the admission of Utah into the Union.

CONCLUSION

Great Salt Lake is, as the State remarks, one of the largest bodies of water in the Western Hemisphere (Br. p. 52). An outsider, seeing on a map of the United States a large patch of blue second only to the Great Lakes, would naturally impute to the area the activities customarily associated with bodies of water of this size: substantial cities which are centers of commerce whose vessels engage in intensive trade with each other by regularly plying the waters of this large lake. He would of course be wrong. The inutility, the foresakenness, of the Lake, and its commercial irrelevance to the area in which it is situated, have long been known to the local inhabitants who have observed it over the years. We need only cite guides to Utah prepared in the 1870's and 1880's, which, in referring to the "General Garfield," consistently point out that "this boat is used chiefly for excursions, there being no business to justify Great Salt Lake navigation" (Ex. D-3, pp. 75 (1879), 88 (1884); 102 (1888), and 107 (1888).

The matter is well summed up by Dr. Thomas C. Adams (whose particular qualifications to express a view on the subject we have already discussed) in testimony before the Senate Subcommittee on Public Lands in 1965 (Ex. P–31, p. 141):

> The navigability of the lake is obviously a matter for serious question. The lake is not now nor has it ever been a channel of commerce. On three historical occasions the water level has become so low due to natural causes that the prevailing belief was that the lake would dry. The only attempt, many years ago, to pursue regular commerce was shortlived and commercially not successful. Other operations of craft have been in the nature of desultory recreational boat with small craft transportation of livestock to and from summer ranges in some high-water years, or a few operations of floating construction equipment which might equally have been conducted in a swamp. The shores of the lake have rarely been usable for boat landings, no usable piers now exist, and the only attempt to construct and operate a public harbor of refuge has been abandoned. * * * The State of Utah has been completely unmindful about navigability of the lake, contributing in no way to this by regulation or public works and often proposing to do things or allowing others to do things which seriously impair the physical navigability of the lake.

As Dale L. Morgan's book on Great Salt Lake puts it: "The lake has never been hospitable to commercial boats * * *," and "has had only the most negligible of influences in the economy of its hinterland" (Ex.

D–3, pp. 173 and 213). This is what the evidence presented in the hearing in this case bears out—both the positive evidence as to the difficulty of use, and the negative evidence as to actual use.

The United States urges the Special Master to find the Great Salt Lake is not navigable and to adopt the proposed Findings of Fact and Conclusions of Law appended hereto.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Deputy Solicitor General.

MARTIN GREEN,
Attorney.

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APPENDIX 1

Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. The State of Utah was admitted into the Union on January 4, 1896 [29 Stat. 876].

2. Great Salt Lake is a nontidal body of water entirely within the State of Utah. [Exs. P–1, P–2, P–3, D–4, Item 00, p. 3.]

3. The Bear, Weber, and Jordan Rivers flow into Great Salt Lake. The Weber and Jordan Rivers are entirely within the State of Utah; the Bear River originates in Utah, but flows through Wyoming and Idaho before reaching Great Salt Lake. [Exs. P–1, P–6, P–7, P–32, p. 33.]

4. Great Salt Lake has no outlet. Within historic times, it has had a maximum length of approximately 77 miles, a maximum width of approximately 32.5 miles, and a maximum depth of about 30 feet. [Exs. P–1, P–2, P–3, P–4, P–5.]

5. The Lake occupies a flat, relatively shallow basin in the area known as the Great Basin. It is bordered on the east by the Wasatch Mountains, and on the west by the Great Salt Lake Desert. The Oquirrh Mountains are located on the south and several small mountains are situated on the north. [Exs. P–1, D–4, Item 00, p. 2.]

6. The shore of the Lake has a slope of less than 1 foot in 1,000 feet. Except for an area at the southeastern shore of the Lake, at the base of the Oquirrah Mountains, the Lake is surrounded by flat stretches of

salt marshes and bogs, sometimes several miles in width. [Exs. P–1, D–3, p. 167, D–4, Item QQ, p. 15.]

7. Settlement in the vicinity of the Lake began in about 1847; the area on the eastern shore and within twenty miles of the Lake has always been the most populated portion of the State; in 1960, the number of persons in Davis County, Salt Lake City and Ogden, all of which areas are within twenty miles of the Lake, was approximately 325,000, and comprised almost half of the population of the State of Utah. [Ex. D–3, pp. 4, 168, 169, 280, 281, 282.]

8. Except for Lakeside on the west shore of the Lake, which has a population of about 50 people who maintain the tracks of the Southern Pacific Railway, there are no communities immediately bordering the Lake. On the eastern and southern shores of the Lake, there are no communities nearer than four miles to the waters of the Lake; on the western and northern shores, except for Lakeside, there are no communities anywhere near the Lake within the State of Utah. [Ex. P–1, Tr. 253.]

9. The Lake is physically capable of supporting large boats, barges and similar craft currently in general use on bodies of water other than Great Salt Lake. [Tr. 202–208.]

10. A total of forty boats can be identified as having been on the waters of Great Salt Lake from 1824 until the admission of Utah into the Union in 1896.

11. Exclusive of craft used to construct or maintain the railroad across the Lake, approximately fifty craft can be identified as having been on Great Salt Lake since the date of Utah's admission into the Union.

12. The activities engaged in by the vessels known to have been on the Lake since 1824 include: (1) transporting passengers, ore, fence posts, railroad ties

and salt; (2) hauling livestock to and from Antelope and Fremont Islands as part of the operations of a ranch; (3) carrying guano as part of a company operation from Gunnison and Bird Islands to the mainland; (4) the harvesting of brine shrimp; (5) the construction and maintenance of railroad lines across the lake; (6) excursions; (7) the exploration and scientific study of the Lake; (8) private recreation and pleasure; and (9) rescue operations.

13. In the total history of the Lake, only seven boats can be identified as having engaged in the activity of commercially transporting passengers, ore, fence posts, railroad ties and salt. Only one of these vessels, the *City of Corinne,* engaged in regularly scheduled freight and passenger service. It began these operations in June 1871 and terminated them in June, 1872. One of these "vessels," a raft of railroad ties, had been on the Lake one time only, in 1869. All of these boats had been used on the Lake and had ceased operations prior to the admission of Utah into the Union, and five of these boats had either been wrecked or had not engaged in the activity of carrying passengers, ore, fence posts, railroad ties and salt for at least twenty-five years prior to the admission of the State of Utah into the Union in 1896.

14. The only dock ever along the Lake available for use by the general public was the Salt Lake County Yacht Harbor, which was completed in 1939 and was no longer significantly used in 1960. [Ex. D–4, Item C, p. 1.]

15. At no time since 1824 did or could vessels on the Great Salt Lake travel by water from the Lake up any of its affluents to any place outside of the State of Utah. [Ex. P–32, p. 33.]

CONCLUSIONS OF LAW

1. A State upon its admission into the Union acquires by virtue of its sovereignty title to the beds of all the navigable bodies of water within its borders.

2. In any proceeding involving the question of the navigability of a body of water, the burden of proof is always on the proponent of navigability.

3. Navigability, when asserted by a State as the basis of its title to lands underlying bodies of water, is necessarily a question of federal law to be determined according to the general rule recognized and applied in federal courts.

4. Navigability under federal law, when asserted by a State as the basis of its title to lands underlying bodies of water, must be determined as of the date of the admission of the State into the Union.

5. To be navigable under federal law, a body of water must constitute a highway of commerce over which trade and travel is or may be carried on in the customary modes of trade and travel on water. Mere depth or expanse of water, without profitable utility, will not render a water course navigable in the legal sense.

6. The commerce which must be shown to exist or to be capable of existing on a body of water in order for that body of water to be deemed a navigable water for the purpose of vesting in the State title to its bed must be practical, useful and beneficial to the public. The fact that it is used for pleasure boating, or to enable fisherman to float their boats, is not sufficient. A theoretical or potential use for commerce, or one that is temporary, precarious, and unprofitable, is not sufficient.

7. In determining the navigability of a body of water in an area which was populous and had been

long settled at the time of the admission of the State in which it is located into the Union, the actual use or nonuse of that body of water as of the date of Statehood will be deemed most persuasive.

8. The use of boats by the owners of Fremont and Antelope Islands in Great Salt Lake to carry sheep and cattle back and forth from their island grazing fields to the mainland in connection with their business operation, as well as the use of such boats to carry supplies to employees of these islands, where such activity was carried on on behalf of not more than five people or organizations, cannot be deemed to show the utility for commerce to the general public of the waters of Great Salt Lake.

9. The hauling of guano from Gunnison and Bird Islands in Great Salt Lake cannot be deemed to show the utility of the waters of Great Salt Lake to the general public, where nothing is known as to the date or the extent of the guano hauling operation on Gunnison Island, and it appears that only one boat was used, fifty years after Statehood, and then for a period of not more than nine years, in hauling the guano from Bird Island.

10. The use of boats for harvesting shrimp from the Lake is not trade and travel on water in the customary modes of trade and travel on water.

11. The use of boats for the construction and maintenance of a railroad across the Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

12. The use of boats to take persons on pleasure excursions of the Lake, where such excursions are ~~for the most part from~~ twenty minutes to four hours in duration, the boats then returning to the point whence they had departed, without having discharged any passengers on the way, is not trade and travel on

water in the customary modes of trade and travel on water.

13. The use of boats for the exploration and scientific study of Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

14. The use of boats for recreational and pleasure sailing on the Great Salt Lake does not constitute trade and travel on water in the customary modes of trade and travel on water.

15. The use of boats for police patrol activities and rescue operations does not constitute trade and travel on water in the customary modes of trade and travel on water.

16. A showing that in the last 145 years, only seven boats on Great Salt Lake have been devoted to the hauling of passengers and freight, only one of which operated on a regular schedule (such operation not lasting more than one year); that of the seven boats, five were either no longer in existence or no longer carrying passengers and freight at least twenty-five years prior to Statehood, while either the existence or activities of the other two boats at the date of Statehood is unknown; that all seven of these boats were operating on the Lake at a time when the level of the Lake was much higher than it was at the date of Statehood, and much higher than it has ever been since again, is not sufficient to establish that Great Salt Lake was, at the time of the admission of Utah into the Union on January 4, 1896, a highway of commerce over which trade and travel were or could have been carried on in the customary modes of trade and travel on water.

17. A showing that after Statehood, there were no boats at all engaged in the carrying of passengers and freight, even though the population in the area con-

tinued to increase; that such uses as were made of the Lake after Statehood were extremely limited in scope, and of no commercial importance or consequence to the general public living in the vicinity of the Lake; that there never was more than one harbor on the Lake accessible to the public, which harbor was in use only after about 1935, and was never used by any vessel carrying passengers or freight from one part of the Lake to another, save for a guano boat, if that be deemed an exception, and which harbor is not now in use; that the Lake is surrounded by extensive marshes, bogs and flats which make access to it difficult; that the shores and bed of the Lake generally have a slope of less than one foot in a thousand feet, a condition which makes the launching of craft on the Lake difficult; that with the exception of the railroad settlement at Lakeside, which has a population of about 50 people, there are no communities immediately on the shores of the Lake, nor within at least four or five miles of the short of the Lake; such a showing is sufficient to warrant the conclusion that Great Salt Lake's susceptibility to use as a highway of commerce is too conjectural and hypothetical to establish its navigability for the purpose of vesting to the State title to the bed thereof.

18. Great Salt Lake was not on the date of Utah's admission into the Union navigable under the laws of the United States, and title to the bed of the Lake, therefore, did not on January 4, 1896, vest in the State of Utah, but remained in the United States.

19. The lands conveyed to the State of Utah on June 15, 1967, pursuant to the Act of June 3, 1966 (80 Stat. 192), include all of the lands below the meander line of Great Salt Lake as depicted on the map attached to the Stipulation filed by the parties in

this case, subject to the reservations and conditions set forth in the Act of June 3, 1966, *supra*.

20. The State of Utah having had no title to the bed of Great Salt Lake prior to the conveyance thereof to the State by the United States on June 15, 1967, is required, in order to retain title thereto in accordance with the Act of June 3, 1966, *supra*, to pay to the United States within two years from the date of the decree herein the fair market value of the entire bed of the Great Salt Lake below the meander line of that Lake, as that value shall be determined by the Secretary of the Interior as of the date of the decree herein

APPENDIX 2

1. The first boat ever on the Lake[1] was the bull boat (a shallow draft tub-shaped boat made of buffalo skins) of Jim Bridger, to whom the credit for discovering the Lake is usually given. The traditional story is that Bridger was one of a party of trappers who, while travelling along the Bear River, began to speculate as to the course and destination of that stream. A wager was made, and Bridger, the youngest member of the crowd, was chosen to learn the answers. This was either late in 1824, or early in 1825. Bridger sailed down the stream and in due time reached Bear River Bay, where, after tasting the water, and spitting it out, he concluded that he had reached the shores of the Pacific Ocean. Ex. P–8, p. 18A; Ex. D–3, pp. 252 and 254.

2. In 1826 James Clyman and three companions "searching for beaver skins" circumnavigated the Lake in bullboats. There is no evidence that beaver skins were ever found, or that the Lake was ever used by trappers for the transportation of pelts. Ex. P–8, p. 18A; Ex. D–3, pp. 32, 251 and 254.

3. In 1843, the explorer John B. Fremont, in the company of Kit Carson and several others, sailed in an eighteen foot long "frail batteau of gumcloth distended with air, and with pasted seams" to the island in Great Salt Lake which now bears his name. Ex. P–8, p. 1; Ex. D–3, pp. 93, 252 and 254.

4. The first vessel put on the Lake by the Mormon

[1] There is no authentic record of the Indians ever having placed any boats on the Lake. Cf. Ex. D–3, p. 12.

settlers of the Great Salt Lake Valley was the "Mud Hen," which, in 1848, at the direction of Brigham Young, carried Albert Carrington and others on a two week exploring trip of the Great Salt Lake and its islands. The "Mud Hen" was a skiff on wheels, made of five fir planks. It was 15 feet 4 inches long and 4 feet 4 inches wide. Ex. P–8, p. 18A; Ex. D–3, pp. 53, 54 and 180.

5. In the spring of 1850, Captain Howard Stansbury of the U.S. Army Topological Survey Corps launched on the Great Salt Lake a yawl which had been built during the preceding winter, and in this yawl he and his company made the first accurate survey of the Lake. The yawl was named "Salicornia" or "Flower of Salt Lake" by the exploring party, but was generally referred to only as "The Sally." Ex. P–8, p. 18A; Ex. D–3, pp. 5, 8, 22, 180 and 261.

6. Along with "The Sally," Captain Stansbury used during his survey of the Lake in 1850 a small skiff. Ex. P–8, p. 18A; Ex. D–3, pp. 8 and 22.

7. On January 30, 1854, Brigham Young launched his boat, "The Timely Gull." It was 45 feet long, and although designed for a stern wheel to be propelled by horses working a treadmill, it was in fact always propelled by wind and sail. The boat was used primarily to carry church cattle to Antelope Island, but it was also used to transport cedar wood, salt and flagging, as well as for pleasure excursions. The boat was wrecked by a gale in 1858. Ex. P–8, pp. 2 and 18A; Ex. D–3, pp. 24, 40, 180, 182, 183, 229 and 272.

8. A notice published in the "Deseret News" on May 9, 1855, by one J. Cowdy announced that "the sail boat 'Deseret' is now ready to take parties out on the water, for pleasure excursions, either on Jordan or Salt Lake on reasonable terms * * *." Ex. P–8, p. 2.

9. When **Brigham Young visited** Antelope Island in 1856, he **was taken there from the shore** of the Lake in a **rowboat used by Joseph Toronto** and Peter O. Hansen **"while the teams forded it."** Ex. D–3, pp. 38 and 229.

10. In 1865, David L. Davis, who was originally from Wales and had arrived in Salt Lake City the year before, was sailing on the Great Salt Lake in "the brave sloop 'Eureka,' which was among the first pleasure craft on the Great Salt Lake * * *," and was the first of many pleasure craft used by "Captain" Davis during the following 50 years. The "Eureka" was 19 feet long with a six foot beam, and was on the Lake for about 8 or 10 years after 1865. It was engaged by the United States Geological Survey in 1869 for use in surveying the lake. Sailing was Captain Davis' hobby and recreation—he was for many years the "Captain" of the Salt Lake Yacht Club, which had for its object "the advancement of the general interest in aquatic sports"; his trade, in which he had been engaged since he was 14 years old, was that of a merchant. Ex. P–8, pp. 20, 23B, 23D, 24, 25 and 27.

11. For a number of years in the 1860's there was on the Lake the "lonesome pleasure yacht" of the Walker Brothers, who were merchants in Salt Lake City. Little is known about this boat, except that it was built by Gammon Hayward, and was a sailboat, "designed purely for pleasure purposes." Ex. P–8, p. 18A; Ex. D–3, pp. 75, 102, 188 and 209.

12. In September, 1867, Elbert Eastam and Ben Hampton, "having built a yacht at Bear River bridge, sailed down Bear River to G.S. Lake, 75 miles, thence up the Jordan River to G.S.L. City, making the journey in two days." Nothing else is known about this yacht. Ex. D–3, p. 57.

13. On April 14, 1867, John B. Meredith arrived near the bridge on the Jordan River, with the schooner "Star of the West," having a cargo of salt from Great Salt Lake, "he claiming it was the first voyage up the river from the lake, thus proving the river navigable." There is no record of this boat's ever having carried another cargo of salt. In June, 1868, the boat was used to supply water to a survey party headed by one F. C. Hodges, and in the course of this enterprise was swept by a gale onto some rocks, where it was broken. There is no evidence that it was ever floated again. Ex. P–8, p. 18A; Ex. D–3, pp. 56, 140 and 189.

14. On March 7, 1869, David L. Davis and one James Glade "went down to the river in W. D. Williams' boat." There is no evidence as to what kind of boat this was, or what it was used for. Ex. D–8, p. 20.

15. As the Union Pacific and Central Pacific Railroads were extended toward each other in the race to complete the transcontinental railroad (the driving of the Golden Spike joining the two halves of the continent took place at Promontory, immediately north of Great Salt Lake, on May 10, 1869), "there was a boom in the market for lumber, and in its wake Great Salt Lake for the first time began to commend itself for commercial navigation." in 1867 or 1868, General Patrick Connor, who had come to Utah with the United States Army to police the State, and had decided to stay, launched on the Lake the "Pioneer," a flat-bottomed sail boat used for carrying railroad ties. How long it was in use is unknown, but its hulk was eventually abandoned at the mouth of the Jordan River. Ex. P–8, p. 23C; Ex. D–3, pp. 140, 190.

16. Apparently General Connor had a contract with the Union Pacific Railroad to supply it with ties. For this purpose, on December 11, 1868, he launched on the Lake its first steamboat: the "Kate Connor,"

named for his daughter. The boat was a side wheeler 55 feet long, and with a beam of 18 feet. It was built by Gammon Hayward, and was used for carrying railroad ties and telegraph poles to Promontory. The boat was not a financial success. Although most of the writers who mention the boat say that it sank in 1871, the boat actually was purchased in 1872 by Christopher Layton, and thereafter used for a number of years to haul sheep to and from Antelope Island (apparently for the Mormon church). Ex. P–8, pp. 17, 18A, and 23C; Ex. D–3, pp. 69, 75, 190, 192, 245 and 254.

17. General Connor also put on the Lake in 1869 the "Pluribustah," a schooner of 100 tons burthen. Almost nothing is known about this vessel. Ex. P–8, p. 18B; Ex. D–3, pp. 75, 102, 190 and 219.

18. In order to supply the demand for railroad ties needed for the construction of the Utah Central Railroad (which connected with the Union Pacific at Ogden) timber was cut and hewed in Dry and Pine Canyons in the winter of 1868–9, hauled to the Lake, and there built into a large raft, 300 feet long by 16 feet wide, which was then poled to the vicinity of Farmington, where it was dismantled, and the ties carried to the construction site. Ex. P–8, p. 2B; Ex. D–3, p. 191.

19. On May 24, 1871, the "City of Corinne," was launched in the Bear River. Except for the barges used in 1957 to 1959 to construct the railway causeway (see Item 67, *infra*), this is the largest boat ever to have been on Great Salt Lake, being a three-decker steamboat, 150 feet long and of 250 tons burthen, propelled by a large paddle wheel at her stern. In early June, 1871, it began to carry ore and passengers from Lake Point, on the south shore of the Lake, to Corinne, on the Bear River on the northeast shore of the Lake, making three trips a week. But within a few

months—by the end of 1871—the boat was reported a financial failure, and in April, 1872, the boat was sold to the Lehigh and Utah Mining Company, and was immediately converted into an excursion boat. By June, 1872, the boat was operating as an excursion steamer out of Lake Side, on the east shore of the Lake below Farmington. In 1875, the boat was renamed the "General Garfield," and moved its home port to Lake Point, also known as Clinton's Landing, on the south shore of the Lake, where it took pleasure seekers 15 or 20 miles out into the Lake in the course of two hour cruises. In 1881, the boat was permanently moored by its then owner, Captain Douris, a short distance west of Black Rock, at a place which came to be known as Garfield Landing, and was used as a hotel and restaurant, its paddle wheel, smokestacks and machinery having been removed. In 1904, the boat caught fire and was destroyed. Ex. P–8, pp. 3, 4, 5, 23C and 26C; Ex. D–3, pp. 25, 74, 75, 88, 163, 193, 206, 207, 229, 244, 253 and 254.

20. On August 9, 1871, John W. Young, a son of Brigham Young, launched "The Lady of the Lake," a "tiny steamboat." This vessel was 30 feet long, had a 10 foot beam, and weighed 7 tons. The boat was used only for pleasure, and although much publicized upon her appearance on the Lake, "she promptly disappeared in the prevailing fog of obscurity shrouding all the early boats." Ex. P–8, p. 18A; Ex. D–3, pp. 75, 88 and 209.

21. The "Water Witch," a yacht owned by the Salt Lake Yacht Club, appears to have been on the Lake from about 1875 to about 1880, and devoted to cruises for the pleasure of the members of the Club. On September 8, 1876, Captain Davis and others made an expedition in the "Water Witch" to determine the feasibility of making an outlet into the desert for the

waters of Salt Lake, the level of the Lake at that time being very high. They were unable to find a point for the proposed cut to be made. Ex. P–8, pp. 20, 23C, 23D and 26A; Ex. D–3, pp. 26, 80 and 225.

22. In September, 1877, Captain Davis put upon the Lake his catamaran, the Cambria, afterwards called the Cambria I to distinguish it from his later boats of the same name. It was about 19 feet long, and had a 10 foot beam. This boat appears to have been used only for pleasure cruises on the lake. It was manned until about 1891. Ex. P–8, pp. 20, 21, 22 and 23D; Ex. D–3, 80, 135, 141, 201 and 210.

23. The "Mary Askie" was one of a number of yachts owned by members of the Salt Lake Yacht Club. This yacht was owned by the Silver Brothers, and in 1877, 1878, 1879 and 1880 participated in the Club's regattas and other sports events. Ex. P–8, pp. 24 and 26A; Ex. D–3, p. 80.

24. The "Petrel" was another such yacht; it was owned by Captain Barratt, and was on the Lake at least until 1882. Ex. P–8, pp. 21, 24 and 26A; Ex. D–3, p. 80.

25. Captain Hudson's "America" was another vessel involved in the yacht club's regatta and sport activities in the late 1870's. Ex. P–8, pp. 24, 26A and 26B; Ex. D–3, p. 80.

26. "Maud," owned by Adam S. Patterson, was another yacht associated with the Yacht Club. The first reference to it is in 1880. There is no evidence that it was used for anything but pleasure and sport. Ex. P–8, p. 18A; Ex. D–3, pp. 80, 135 and 201.

27. The yacht "Pinafore" was associated with the Salt Lake Yacht Club in 1880; it had apparently been built "for the realistic presentation of an opera." Ex. P–8, pp. 18A and 30.

28. "Esther" was a small boat built by Captain

Davis; although there is no evidence as to the purpose of its use, it may have been an excursion boat. Ex. P–8, pp. 18A and 20.

29. After the conversion of the "General Garfield" into a hotel, Captain Dahl's steamboat called the "Whirlwind" took passengers on excursion trips on Great Salt Lake. There are references in the evidence to this boat's being on the Lake in 1884 and 1887. Ex. P–8, pp. 26C and 26D; Ex. D–3, pp. 88, 207 and 229.

30. Captain Douris, the former owner of the "General Garfield," also had his little side-wheel excursion steamer on the Lake; this was the "Susie Riter." The boat was on the Lake in 1886, but its total length of service was only about two years, for in a storm it went down at its anchor. Ex. P–8, p. 21; Ex. D–3, pp. 97 and 207.

31. A reference in the evidence, dated 1889, states that "the 'Eloise Sherman' is a propeller, now used for excursions." Nothing else is known of this boat. Ex. D–3, p. 98.

32. At an early date after the arrival of the settlers in the Great Salt Lake Valley, Henry William Miller and his brother, Daniel Henry Miller, occupied Fremont Island, and used it as a sheep range. Some time before 1884, Daniel Miller's son Jacob designed and helped build the "Lady of the Lake," used by the Millers to haul sheep to and from the island. The boat was 50 feet long and 12 feet wide, with two main masts, the largest one being 50 feet high. She flew four sails—two main sails and two jibs. The ship had two decks, and was capable of carrying 300 head of sheep at a time. When Judge Wenner acquired control of Fremont Island in 1884, he demanded that the Millers remove their sheep, and the boat was used for that purpose at that time. In addition to hauling

sheep, the "Lady of the Lake" was also used for hauling ore, salt and cedar posts. Eventually the ship, in a bad storm, was blown on the beach west of Farmington, where she stood for a number of years, until finally purchased by Judge Wenner (exactly when is not known, but Judge Wenner died in 1891). The ship was renamed the "Argo," and was overhauled for use in going to and from Fremont Island. It appears that this ship was eventually wrecked on the rocks at Promontory Point. Ex. P–8, pp. 16A, 16B, 16C, 16D, 17 and 18A; Ex. D–3, pp. 132, 141, 198, 229 and 236.

33. Before building the "Lady of the Lake," the Millers had used two other small boats. These may have been the sloop and schooner later sold to Charles Spackman, of Farmington, and eventually, shipwrecked near the Promontory. Ex. P–8, p. 16A; Ex. D–3, p. 236.

34. The Millers also built a 75 foot boat with three holds in it for hauling salts from various salt works around the Lake to a railroad connection. This may be the unnamed schooner referred to by Captain Davis as carrying salt from a bed a few miles north of Garfield Beach to a railroad near the Lake. In 1908, the wreck of this schooner could be seen near the tracks at Saltair. Ex. P–8, pp. 16D and 23C.

35. In addition to building boats for themselves, the Millers built prior to 1884 a cattle boat "for another company for the purpose of shipping cattle to Church [Antelope] Island." This was a flat boat about 50 feet long and 18 feet wide. Although there is no evidence in the record either to support or refute this conclusion, it seems likely that this is the cattle boat used by White and Sons, a company which carried on a wholesale butcher business in Davis County, and used Antelope Island for stock raising. The Company kept herefords from England (red cattle with white

faces and markings) as well as buffalo on the island. Their foreman on the island was William Walker, "an expert stockman," whose daughter, Zillah Walker Manning, testified at the hearing in this case. The boat was used by Mr. Walker, as an employee of White and Sons, to carry cattle to and from the island, as well as supplies for the Walker family. It was also occasionally used by the White and Walker families for pleasure trips. The boat appears to have been in use at least until 1903. Ex. P–8, pp. 15, 16D and 39A; Ex. D–3, pp. 229 and 233; Tr. pp. 219–229.

36. Living on Antelope Island at the same time as the Walkers was a George Frarey, who worked for a while at herding cattle on the Island. For this he used a "clumsy, scow-shaped cattleboat, sloop rigged with mainsail and jib, and steered by an oddly placed wheel on the forecastle deck." The boat was used for hauling cattle in 1891, and probably much earlier, but, by 1895 and at least until 1903, the boat was chiefly used for taking passengers on excursion trips over the Lake. Ex. P–8, p. 18B; Ed. D–3, pp. 195 and 196; Tr. p. 225.

37. There is also in the evidence, without any further description, a reference to "the Jake Winters' sheep boat." Ex. D–3, p. 229.

38. Another boat referred to, without any further identification, is George Payne's "Lilly of the Lake." Ex. D–3, p. 229.

39. In 1891, Captain David L. Davis supplanted his original "Cambria" with the "Cambria II," which was also a catamaran, but which was powered by the first gasoline marine engine in Utah. "Cambria II" was 42 feet long, with a 14 foot beam, and was yawl-rigged, with a main and mizzen mast. It appears to have been used for pleasure, and for excursions. It was still on

the Lake as late as 1909. Ex. P–8, pp. 18A and 23D; Ex. D–3, p. 142; Tr. p. 76.[2]

40. Alfred Lambourne, an artist who often took cruises on Great Salt Lake with Captain Davis, moved on to Gunnison Island in 1895 to live there, and to cultivate vineyards, in an attempt to acquire title to it under the Homestead Act. He lived on the island for 14 months, and apparently had the use, during this period of time, of a boat called "Hope." Ex. P–8, p. 18A; Ex. D–3, p. 203.

41. In 1902, the Southern Pacific Railway built a trestle across Great Salt Lake, this trestle, and the tracks on it, being called the Lucin cut-off. The construction of the trestle necessitated the use of seven tugboats and numerous small boats, and a wooden stern wheel steamer, "The Promontory," "which was built on the Lake as soon as the track laid west from Ogden reached sufficient depth of water." This steamboat may have been dismantled in about 1910. Ex. P–9, 10 and 13.

42. At the hearing in this case, counsel for the State of Utah introduced into evidence a picture of a boat called "Lucin," at anchor in San Francisco Harbor, and stated that it was "used at the Lucin cutoff." Nothing else is known about this vessel. Ex. P–8, p. 2D; Tr. p. 241.

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[2] There is a reference in the evidence to a "Cambria III." It is unlikely, however, that such a boat existed. What seems probable is that the author of the reference, knowing that the motor of the Cambria II—this being the first gasoline engine in Utah—was on display in the Utah State Capitol, assumed that the "Cambria" then on the Lake must have been a third "Cambria." It appears, however, that although the original motor on the Cambria II was replaced with a more powerful and a lighter engine as the technology improved, the boat itself was not replaced by another boat.

43. The "Augusta" was a gasoline launch used by the Southern Pacific Railway to patrol the Lucin Cutoff; it was on the Lake in 1908. Ex. P–8, p. 18A; Ex. D–3, pp. 134 and 204.

44. The "E. W. Marsh" was another boat owned by the Southern Pacific Railroad, and used for patrolling the Lucin Cutoff. Tr. p. 96.

45. A boat called "Old Salt Lake" was owned by Charles and John Backman. It seems likely that one of these is the same Mr. Backman who sometime after 1903 carried sheep over to Fremont Island for the owners of that island. Ex. D–3, p. 229; Tr. pp. 227 to 229.

46. The "Seagull" was used prior to 1903 for taking people on excursions to the islands of Great Salt Lake. Tr. p. 227.

47. An excursion boat called the "Alice Ann," which could carry eight passengers, was on the Lake in the years around 1907. Tr. p. 84.

48. John Dooley appears to have had the major interest in the Island Improvement Company which owned, subsequent to White and Sons, the ranching operation on Antelope Island. His tugboat, the "Ruth," was used to haul cattle to and from the island at least during the years 1914 to 1920. Ex. D–3, p. 236; Tr. pp. 85–87, 89, 93–96 and 100.

49. There is in the evidence an undated reference to "'Old Bob,' the Island cattle boat." No information concerning this boat is known. Ex. D–3, p. 229.

50. On June 10, 1909, the stern wheeler excursion steamer ("in good weather") "Vista," which had been operating on Great Salt Lake for two years, sank during a heavy storm. Apparently it was soon refloated, only to be hurled on the shore again during a big storm in July, 1909. The ultimate fate of this ship is not

known. Ex. P–8, pp. 23D, 34A, 34B and 34C; Tr. pp. 87 and 88.

51. The pleasure boat "Irene" was another excursion boat on the Lake at the same time as the "Vista." It was a "large cigar-shaped affair with 50 horsepower gasoline engines." Ex. P–8, pp. 24D, 34B, 34C, and 34D; Tr. p. 87.

52. On July 2, 1909, President Joseph F. Smith and members of his family took a cruise to Bird Island, and other islands in the Great Salt Lake, on the "big gasoline pleasure launch" owned by the Saltair Beach Company. Ex. P–8, p. 34A.

53. W. H. Parker's gasoline powered boat "Victory" was launched on the Lake in July, 1909 The boat was 33 feet long, with a beam of 7 feet, 4 inches. In September, 1909, it engaged in a race with several other "small gasoline launches * * * for the championship of Great Salt Lake." Ex. P–8, pp. 34C and 34D.

54. One of the boats in the September, 1909 race was the "Cozy," Blair Richardson, Captain; Mrs. Richardson at the wheel. Ex. P–8, p. 34D.

55. Another boat in the race was the "Rescue," captained by Larsen, with Will Selly at the wheel. Ex. P–8, p. 34D.

56. Another boat was "Firefly"; Captain Newman; Miss Langford at the wheel. Ex. P–8, p. 34D.

57. Another boat in the race was "Galilee"; Captain, Ralph Brown, aged 10 years; Dorothy Brown, aged 8 years, at the wheel. Ex. P–8, p. 34D.

58. In 1920, the owners of the buffalo herd on Antelope Island used a gasoline launch capable of carrying twenty people both for going to and from the mainland and the island, and for towing a cattle trailer that had a capacity of forty animals. Ex. D–3, p. 238.

59. At the same time, the owners of Antelope Island

aiso used a smaller craft driven by an
propeller. Ex. D–3, p. 238.

60. Some years prior to the death of Captai
G. Brown, in 1937, one Thomas J. Holland w
him on a three day cruise of the islands of Gr
Lake. The cruise was made with a number o
in a fleet of twelve boats. Captain Brown
"mentor of the Salt Lake Yacht Club, a g
amateur sailors, carefully selected from busin
trade and professional circles—men who ha
knowledge of navigation, but a great enthusi
learning the rules of the sea * * *." Ex. P–8,

61. On October 6, 1935, a Standard Oi
crashed into the Lake, and the oil company
four boats to search for it. At the completion
operation, one of these boats was given to t
Lake County Sheriff's Office, where it was u
patrol the area for boats, bathers, in case of
difficulty on the lake, lost people." Ex. D–3,
Tr. p. 105.

62. In the early 1940's, Leon L. Imlay, a wi
the hearing, went to Gunnison's Island in Dic
dard's gasoline-driven sheep barge. The purpos
trip was to observe the guano deposits on the
Tr. pp. 70, 72, and 102.

63. Boats capable of carrying 12 to 15 pas
operated from the Sunset Beach Resort on Gr
Lake from 1934 to 1968. For the most part, pas
were brought to the beach by Greyline Mot
buses, were taken on a 20 or 30 minute trip
Lake, and then returned to their buses: all
one hour. However, parties could charter boat
evening for longer cruises. Tr. pp. 111–122.

64. Among the boats used for excursions at t
set Beach Resort shortly after the Second Wor

was a 28 foot Chris-Craft with an inboard motor. It was used for about 5 years. Tr. p. 113.

65. Also used by one of the excursion concessionaires (Donald Newhouse) at the Sunset Beach Resort was a 40 foot twin engine diesel, which could carry about 35 passengers. Tr. p. 113.

66. A 50 or 60 foot long boat—an LCI—is reported to have hauled guano from Hat Island or Bird Island to the Salt Lake County Boat Harbor during the years 1947 to about 1955. Tr. pp. 117 and 123.

67. In 1957, the Morrison-Knudsen Company began to construct for the Southern Pacific Railway a solid landfill causeway across the Great Salt Lake, parallel to the trestle built in 1902. The construction began early in 1957, and was completed early in 1959. Used in the construction of the causeway were six large dump barges, which were each 250 feet long, 55 feet wide, and 12 feet four inches deep at midship, port and starboard, and two feet deeper than that forward and aft. Pushing each of the barges was a tugboat of a thousand horsepower. Also used were five deck barges, which were 170 by 48 by 10 feet, two 600 horsepower twin screw tour boats, three 220 horsepower tugboats, two dredges, and a number of dredge tenders, anchor scows, anchor barges, pile driving barges, crew boats and scows. The total number of boats used was 39. When the construction work was completed, all except two of the boats used on this project were sold, and removed from the Lake. The two boats remaining on the Lake are used by the Southern Pacific Company for weekly inspections of the causeway. The Railroad has a total of four boats which it uses for these inspections. Tr. pp. 149, 152, 176, 177, 188, 199, 202.

68. In 1962, John Clawson Silver started to operate from the Sunset Beach Resort 20 to 45 minute nar-

rated tours of the Lake on his "sea monsters," that is, converted army amphibious boats. After about two years, he transferred his operation to his own beach, Silver Sands, and continues in that business today. He has a total of nine amphibious boats available for use, although only three are actually at the beach, the rest being in a warehouse. He also uses in this business a launch. Tr. 288, 289.

69. At some time in the recent past John Clawson Silver also used on the Lake a 36 foot Chriscraft boat which was primarily used to take people out on the Lake "as a promotional and goodwill ambassador" for an appliance store he formerly operated. He operated this boat for 13 years. Tr. p. 289.

70. Also in the recent past, Mr. Silver had a barge on the Lake which he used to bring in salt crystals and rock, "not to sell" but just "for decoration and pleasure." Tr. p. 289.

71. The Sanders Brine Shrimp Company, which since 1953 has harvested the small brine shrimp and their eggs from the Lake for processing and sale as tropical fish and trout food, uses three air boats in its operation. These boats are 18 feet long and six feet wide. Tr. pp. 158 and 160.

72. In the recent past, the Sanders Brine Shrimp Company used a 16 or 17 foot boat with a 50 horsepower outboard motor on it, but this boat could not get into the shallow water to which the air boats afford access. Tr. p. 158.

73. A regatta was held on the Lake in 1968, and a number of boats participated in it. Ex. P-26, P-27 and P-28; Tr. p. 211.

74. The "Gilbert," a 42 foot long, 13 ton vessel belonging to the State of Utah Geological and Mineralogical Survey, is currently used on the Lake for con-

ducting scientific investigations. Ex. P-14; Tr. pp. 139, 140, 144, 145 and 147.

75. The "Clyman," a 21 foot long Chriscraft with about an eight foot beam is also used by the Utah State Geological and Mineralogical Survey for the scientific study of Great Salt Lake. Ex. P-14; Tr. pp. 139, 145 and 147.

76. The Utah State Geological and Mineralogical Survey also uses three converted military amphibious trucks, or "ducks" in connection with its studies of the Lake. Ex. P-14; Tr. p. 139.

77. A witness at the hearing said that "Hill Air Force Base has one crash boat," but the witness did not state whether that boat now is, or ever has been, on the Lake. Tr. p. 132.

APPENDIX 3

	Name of Boat	Type of Boat	Owner or User	Date of Use	Purpose	Reference
1.		Bull Boat	Jim Bridger	1824-1825	Exploring	Ex. P-8, p. 18A; Ex. D-3. pp. 252, 254.
2.		Bull Boats	James Clyman	1826	Searching for beaver skins	Ex. P-8, p. 18A; Ex. D-3, pp. 32, 251, 254.
3.		Batteau.	John B. Fremont	1843	Exploring	Ex. P-8, p. 18A; Ex. D-3, pp. 93, 252, 254.
4.	Mud Hen	Skiff in wheels	Brigham Young	1848	Exploring	Ex. P-8, p. 18A; Ex. D-3, pp. 53, 54, 180.
5.	The Sally	Yawl	Howard Stansbury.	1850	Survey	Ex. P-8, p. 18A; Ex. D-3, pp. 5, 8, 22, 180, 260.
6.		Skiff	Howard Stansbury.	1850	Survey	Ex. P-8, p. 18A; Ex. D-3, pp. 8, 22.
7.	The Timely Gull		Brigham Young	1854	Transporting cedar, salt, flagging and cattle, and pleasure excursions.	Ex. P-8, pp. 2, 18A; Ex. D-3, pp. 24, 40, 180, 182, 183, 229, 272.
8.	Deseret	Sail Boat	J. Cowdy	1855	Pleasure excursions	Ex. P-8, p. 2.
9.		Rowboat	Brigham Young	1856		Ex. D-3, pp. 38, 229.
10.	Eureka	Sloop	David L. Davis	1865	Pleasure, Surveying	Ex. P-8, pp. 20, 23B, 23D, 24, 25, 27.
11.		Sailboat	Walker Brothers	1860's	Pleasure	Ex. P-8, p. 18A; Ex. D-3, pp. 75, 102, 188, 209.
12.		Yacht	Elbert Eastam, Ben Hampton.	1867		Ex. D-3, p. 57.
13.	Star of the West	Schooner	John B. Meredith.	1867-1868	Carrying salt; Supplying Survey party.	Ex. P-8, p. 18A; Ex. D-3, pp. 56, 140, 189.
14.		"Boat"	W. D. Williams	1869		Ex. D-8, p. 20.
15.	Pioneer	Flat-bottomed Sail boat.	Patrick Connor	1867 or 1868	Carrying railroad ties	Ex. P-8, p. 236, Ex. D-3, pp. 140, 190.
16.	Kate Conner	Steamboat	Patrick Connor	1868	Carrying railroad ties and telegraph poles.	Ex. P-8, pp. 17, 18A, 23C; Ex. D-3, pp. 69, 75, 190, 192, 245, 254.
17.	Pluribustah	Schooner	Patrick Connor	1869		Ex. P-8, p. 18B; Ex. D-3, pp. 75, 102, 190, 219.
18.		Raft of railroad ties		1868-9	Transporting railroad ties	Ex. P-8, p. 2B; Ex. D-3, p. 191
19.	City of Corinne (Name changed to General Garfield in 1875).	Steamboat		1871	Carry ore	Ex. P-8, pp. 3, 4, 5, 23C, 26C.
				1872-1881	Excursion	Ex. D-3, pp. 25, 74, 75, 88, 163, 193, 206, 207, 229, 244, 253, 254.

20. The Lady of the Lake	Steamboat	John W. Young	1871	Pleasure	Ex. P-8, p. 18A; Ex. D-3, pp. 75, 88, 209.
21. Water Witch	Yacht	Salt Lake Yacht Club.	1875-1880	Pleasure cruises	Ex. P-8, pp. 20, 23C, 23D, 26A; Ex. D-3, pp. 26, 80, 225.
22. Cambria	Catamaran	Capt. Davis	1877	Pleasure cruises	Ex. P-8, pp. 20, 21, 22, 23D; Ex. D-3, pp. 80, 135, 141, 201, 210.
22. Mary Askie	Yacht	Silver Brothers	1877-1880	Recreation	Ex. P-8, pp. 24, 26A; Ex. D-3, p. 80.
24. Petrel	Yacht	Capt. Barratt	1882	Recreation	Ex. P-8, pp. 21, 24, 26A; Ex. D-3, p. 80.
25. America	Yacht	Capt. Hudson	1870's	Recreation	Ex. P-8, pp. 24, 26A, 26B; Ex. D-3, p. 80.
26. Maud	Yacht	Adam S. Patterson.	1880	Recreation	Ex. P-8, p. 18A; Ex. D-3, pp. 80, 135, 201.
27. Pinafore	Yacht	Salt Lake Yacht Club.	1880	Opera	Ex. P-8, p. 23D; Ex. D-3, p. 80.
28. Esther	Boat	Capt. Davis		Excursions	Ex. P-8, pp. 18A, 30.
29. Whirlwind	Steamboat	Capt. Dahl	1884, 1887	Excursions	Ex. P-8, pp. 26C, 26D; Ex. D-3, pp. 88, 207, 229.
30. Susie Riter	Steamer	Capt. Douris	1886	Excursions	Ex. P-8, p. 21; Ex. D-3, pp. 97, 207.
31. Eloise Sherman	Propeller		1889	Excursions	Ex. D-3, p. 98.
32. Lady of the Lake (Boat later sold to Judge Wenner, who changed name to "Argo".)	Sailboat	Jacob Miller	1884	Hauling sheep, etc.	Ex. P-8, pp. 16A, 16B, 13C, 16D, 17, 18A; Ex. D-3, pp. 132, 141, 198, 229, 2
33.	Sloop Schooner	Millers			Ex. P-8, p. 16A; Ex. D-3, p. 236.
34.	Schooner	Millers		Hauling salt	Ex. P-8, pp. 16D, 23C.
35.	Flat boat	White & Sons	1884	Hauling cattle, Pleasure	Ex. P-8, pp. 15, 16D, 39A; Ex. D-3, pp. 229, 233; Tr. pp. 219-229.
36.	Scow	George Frarey	1895-1903	Hauling cattle, Excursions	Ex. P-8, p. 18B; Ex. D-3, pp. 195, 196; Tr. p. 225.
37.	Sheep boat	Jake Winters		Hauling sheep	Ex. D-3, p. 229.
38. Lilly of the Lake		George Payne			Ex. D-3, p. 229.
39. Cambria II	Catamaran	David L. Davis	1891	Pleasure and Excursions	Ex. P-8, pp. 18A, 23D; Ex. D-3, p. 142; Tr. p. 76.
40. Hope		Alfred Larabourde.	1895		Ex. P-8, p. 18A; Ex. D-3, p. 203.
41. The Promontory	Steamboat	Southern Pacific Railway.	1902	Construction of Lucin cut-off.	Ex. P-9, pp. 10, 13.
42. Lucin					Ex. P-8, p. 21; Tr. p. 241.

	Name of Boat	Type of Boat	Owner or User	Date of Use	Purpose	Reference
43.	Augusta	Launch	Southern Pacific Railway.	1908	Patrol the Lucin cut-off	Ex. P-8, p. 18A; Ex. D-3, pp. 134, 204.
44.	E. W. Marsh		Southern Pacific Railway.		Patrol the Lucin cut-off	Tr. p. 96.
45.	Old Salt Lake		Charles & John Beckman.	1903	Hauling sheep	Ex. D-3, p. 229; Tr. pp. 227-229.
46.	Seagull			1903	Excursions	Tr. p. 47.
47.	Alice Ann			1907	Excursions	Tr. p. 84.
48.	Ruth	Tugboat	John Dooley	1914-1920	Haul cattle	Ex. D-3, p. 236; Tr. pp. 85-87, 89, 93-96, 100.
49.	Old Bob	Cattle boat			Haul cattle	Ex. D-3, p. 229.
50.	Vista	Steamer		1909	Excursions	Ex. P-8, pp. 23D, 34A, 34B, 34C; Tr. pp. 87, 88.
51.	Irene			1909	Excursions	Ex. P-8, pp. 24D, 34B, 34C, 34D; Tr. p. 87.
52.		Launch	Saltair Beach Company.	1909	Pleasure	Ex. P-8, p. 34A.
53.	Victory	Launch	W. H. Parker	1909	Recreation	Ex. P-8, pp. 34C, 34D.
54.	Cozy		Blair Richardson	1909	Recreation	Ex. P-8, p. 34D.
55.	Rescue		Larson		Recreation	Ex. P-8, p. 34D.
56.	Firefly		Capt. Newman		Recreation	Ex. P-8, p. 34D.
57.	Galilee		Capt. Ralph Brown.		Recreation	Ex. P-8, p. 34D.
58.		Launch		1920		Ex. D-3, p. 238.
59.		Propeller				Ex. D-3, p. 238.
60.		12 boats	Capt. Edwin G. Brown.	1937	Recreation	Ex. P-8, p. 31.
61.			Salt Lake County Sheriff's office.	1935	Patrol lake	Ex. P-3, p. 173; Tr. p. 105.
62.		Sheep Barge	Dick Stoddard	1940's	Haul sheep	Tr. pp. 70, 72, 102.
63.		Miscellaneous boats	Sunset Beach Resort.	1934-1968	Excursions	Tr. pp. 111-122.
64.		Chris-Craft	Sunset Beach Resort.		Excursions	Tr. p. 113.
65.			Donald Newhouse.		Excursions	Tr. p. 113.

66.	LCI		1947–1955	Haul guano	Tr. pp. 117, 123.
67.	39 boats	Southern Pacific Company.	1959	Construction of causeway across Great Salt Lake.	Tr. pp. 149, 152, 176, 177, 188, 199, 202.
68.	3 Amphibious boa's, 2 Launches.	John Clawson Silver.	1963–1967	Excursions	Tr. pp. 288, 289.
69.	Chriscraft	John Clawson Silver.		Publicity	Tr. p. 289.
70.	Barge	John Silver		Carry salt crystals and rock "for decoration and pleasure".	Tr. p. 289.
71.	3 Air boats	Sanders Brine Shrimp Company.	1967	Harvesting shrimp	Tr. pp. 1–8, 160.
72.	Boat	Sanders Brine Shrimp Company.		Harvesting shrimp	Tr. p. 158.
73.				Regatta	Ex. P–26, P–27, P–28; Tr. p. 211.
74. Gilbert	13-ton vessel	State of Utah Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P–14; Tr. pp. 139, 140, 144, 145, 147.
75. Clyman	Chriscraft	Utah State Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P–14; Tr. pp. 139, 145, 147.
76.	3 Amphibious trucks or "ducks".	Utah State Geological and Mineralogical Survey.	1969	Scientific investigation	Ex. P–14; Tr. p. 139.
77.	Crash boat	Hill Air Force Base.	1969	Rescue operation	Tr. p. 132.

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APPENDIX 4

The vessels listed in Appendices 2 and 3, may be placed into eight categories, depending upon the uses to which they were put. The following table lists the eight categories, and indicates, by references to the Item numbers used in Appendices 2 and 3, the categories into which the vessels fall.

I—Pleasure and Recreation

10, 11, 20, 21, 22, 23, 24, 25, 26, 27, 28, 52, 53, 54, 55, 56, 57, 60, 73.

II—Excursion Boats

8, 29, 30, 31, 39, 46, 47, 50, 51, 63, 64, 65, 68.

III—Transporting Sheep and Cattle

35, 36, 37, 45, 48, 49, 58, 62.

IV—Railroad Construction and Maintenance

41, 42, 43, 44, 67.

V—Exploration and Scientific Studies

1, 2, 3, 4, 5, 6, 74, 75, 76.

VI—Commercial Trade or Travel

7, 15, 16, 18, 19, 32, 34.

VII—Miscellaneous Uses

9, 13, 61, 66, 69, 70, 71, 72, 77.

VIII—Unknown Uses

12, 14, 17, 33, 38, 40, 59.

APPENDIX 5

Comments on and Corrections of the State of Utah's Summary of Evidence

1. Paragraph (c) of the summarization of the testimony of Zillah Walker Manning (Br. 16) is:

> c. She remembered that a harvester, requiring 12 horses to pull it, was taken to the island by boat (T. 222); and that grain raised on the island was shipped by boat, "lots of times", about twice a week in the summertime and once a month in the winter (T. 223).

The reference to this transcript shows that Mrs. Manning said two separate things, first, that she saw grain shipped on her father's boat "lots of times," (Tr. 223, line 9), and second, that her father operated the boat twice a week in the summertime, and sometimes once a month in the wintertime (Tr. 223, lines 16 and 18). But Mrs. Manning did not say that grain was shipped twice a week in the summer and once a month in the winter.

2. Paragraph (f) of the summarization of the testimony of Leon L. Imlay (Br. 18) is:

> f. Beginning in 1928, as an employee of the Royal Crystal Salt Company, he was assigned the responsibility of operating the pump station owned by that company and located near Saltair Resort, and used to pump lake brines to evaporation ponds for production of commercial salt; he was in charge of the pump station for about 11 years, or until 1939; during this period he visited the pump station one or two days each week, the pump station being located in water about 8 feet deep; during these visits

> he would see a number of boats, ranging in size from "tiny" boats to large power boats; and, in fact, he and his crew always had to use boats to operate the pump station, carrying crewmen, gasoline for the pump, fresh water and general supplies (Tr. 68–69, 73).

The summary fails to mention that from 1917 to 1939 Mr. Imlay worked for three or four different salt companies on or near the shores of Great Salt Lake, and that during all of this time all of the salt produced by these companies was sent to market by rail (Tr. 73, lines 19 to 25; Tr. 74, lines 1 to 16).

3. Paragraph (a) of the summarization of the testimony of Francis W. Kirkham (Br. 21) is:

> a. He was born in 1877, nine years before Utah's statehood; was familiar with the boating activities at Garfield Beach before statehood; was a paying passenger on the excursion boat pictured on page 12 of Exhibit P–8; and the firsts such trip that he took was before 1896 (T. 233–35).

It is noteworthy that Dr. Kirkham, who was 92 years old at the time of the hearing, and had lived in the area almost all of his life, had never gone to Great Salt Lake for any reason other than recreation.

4. Paragraph (b) of the summarization of the testimony of Phil Dern (Br. 21) contains a minor inaccuracy:

> b. Every year from 1934 to the present time Sunset Beach has operated boats for hire, usually on a concession basis whereby Sunset Beach receives a percentage of the gross income from boat rides and rentals, which percentage now approximates $10,000.00 per year (T. 112); the average boat would carry 12 to 15 passengers, although the present concessionaire (John Silver) also uses several larger amphibious "army ducks" (T. 113).

The word "present concessionaire (John Silver)" suggest that the beach is currently operating, with John Silver as a concessionaire; actually, the beach did not open in 1968 (Tr. 114, line 13) and the testimony with respect to Mr. Dern's plans to obtaining a concession at the new Antelope Island State Park (Tr. 114, lines 18 to 25) suggests that the beach had not been in use in 1969 up until and including the time of the hearing in this matter. And Mr. Silver's testimony shows that while he used to be a concessionaire at Sunset Beach, he now has his own Silver Sands Beach (Tr. 287, line 22; Tr. 288, lines 1 and 2).

5. Paragraph d of the summarization of the testimony of Harold J. Tippets (Br. 24) is:

> d. The State of Utah, Salt Lake County and Hill Air Force Base own and operate rescue craft on the lake (T. 132).

What Mr. Tippets actually said is that the State has craft which *will be* on the Lake; that county Sheriff offices *have been* involved in rescue operations on the Lake, and that Hill Air Force Base has one crash boat (Tr. 132, lines 16 to 25). But he did not say, as the summary suggests, that any of these organizations *presently have* craft on the Lake.

6. Paragraph (e)(1) of the summarization of the testimony of Thomas T. Lundee (Br. 26) is:

> e. The Great Salt Lake was particularly economical for navigation, because:
> (1) The water did not freeze in winter and the causeway fleet operated day and night, six or seven days a week, twelve months a year (T. 177);

The summary is correct (although the reference to the Lake's not freezing is on page 172 of the transcript), and doubtless when the Lake is as low as it

was in 1957 to 1959, the higher salt concentration then existing would make the formation of ice an extremely rare phenomenon. However, in past years, when the level of the Lake has been higher, ice has been a menace to the few boats on the Lake. In Plaintiff's Exhibit 8, on page 21, appears this entry in the Journal of Captain David L. Davis:

> November, 1882. 16th to 20th was caught out in an ice flow on the great Salt Lake. The circumstances were these: The "Cambria" was blown out from her anchorage at Lake Shore by a hurricane. J. F. Hardie and myself went in search of her in the "Petrel." We found her still anchored to about 300 feet of railroad iron within 3 or 4 miles to the south end of Antelope Island. On our way out we met some ice but had no trouble getting through. We captured a muged goose, and placed him in the forepart of the boat.
>
> Coming home Hardy in "Petrel" and myself in "Cambria," we struck hard ice about three miles off Lake Shore and was stuck fast about 500 yards apart. We had no bedding nor food of any kind, and for two days I had no food or water except what ice I melted and that was so salty it made me vomit. We landed in the afternoon of Sunday at the Day farm in Kaysville having drifted some 8 or 10 miles with ice field since Thursday when we stuck. This was my **worst trip on the lake.**

And some time before, Christopher Layton, who had purchased the "Kate Connor" to use for transporting sheep to and from Antelope Island for the Mormon Church, had had a similar experience in that boat (Ex. D–3, p. 70):

> I had charge of the sheep and island for five years, and we had many exciting adventures and also some accidents, but no lives were lost and many are the good pleasant times we had.

> At shearingtime our girls and boys, with one of my wives to take charge of affairs, would go over to the island. Also at haying time the young folks enjoyed the pleasure of these trips. On one occasion we were bringing a load of fat sheep to Salt Lake for mutton, when the boat was caught in the floating ice, which, coming from Bear River and Jordan River, had met and formed a jam, from which we were unable to extricate ourselves for forty-eight hours. The pounding of the ice on the sides of our boat caused it to leak. We all united in calling upon the Lord in our extremity, and my wives and children, who were on shore and could see our peril, also prayed for help. A wind arose which drove the ice away, so we were enabled to reach shore, although we were obliged to go back to the island first. Then the next morning, the ice being gone, we easily crossed and were received with much rejoicing by those dear ones who had been so anxious for our safety.

Thus, ice and frozen waters are not altogether unknown to Great Salt Lake.

7. The first clause in paragraph (e) (3) of the summarization of Mr. Lundee's testimony (Tr. 27) is:

> (3) The greater buoyancy of the waters of the Great Salt Lake made navigation more economical than navigation on other inland waters or oceans because there is at least a 20% bonus in carrying capacity (T. 171):

But, as an excerpt from other evidence in the record shows (Ex. D-3, pp. 29—30), this additional buoyancy is a mixed blessing:

> Owing to the density of the waters of the lake, boats that ordinarily would sink to the water line of the boat in fresh water, rode so high as to make them top-heavy in the salty wa-

ter. Even a moderate disturbance gives to the shore breakers prodigious power and the waters become very buoyant. When there is an unusual disturbance they become most destructive, but when a tornado hits the lake it is simply irresistible. With these facts in mind one can readily understand why boats of the lake were so easily lashed to pieces.

8. Paragraph (c) of the summarization of the testimony of Gail Sanders (Br. 29) is:

> c. The company uses three air boats 18 feet long and 6 feet wide (each capable of carrying about 1,200 pounds of adult shrimp) (T. 158-59); other boats have been used in the past, but the air boats are preferable because they can operate in any depth of water (T. 158).

The paragraph may be read as suggesting that air boats were required because the water was deep; the transcript shows that the air boats were required because the water was shallow (Tr. 158, lines 21 to 25).

9. Paragraph (c) of the summarization of the testimony of Elmer Butler (Br. 33) is:

> c. He also testified that he was familiar with the lake and was aware of the dolomite deposits near the lake which were shipped to the Geneva Plant of U.S. Steel for use as a flux, and that he worked at the dolomite mine as a boy (T. 261); that he was aware of "very valuable deposits" of dolomite sands on Stansbury Island which could only be shipped by boat during "expected" high cycles of the lake level (T. 262); that he was aware of valuable guano deposits shipped from Gunnison Island and Hat Island (T. 262); and knew that the livestock on Fremont Island could only be shipped by boat "or

helicopter" and that the livestock on Antelope Island, during high water levels, could only be shipped by boat (T. 263–64).

It is well that the word "expected" is in quotation marks, for the transcript reveals that the person who expects the Lake to rise again is the sanguine attorney for the State of Utah who examined the witness, and not the witness himself (Tr. 262, line 7).

10. The first of the summaries of the exhibits requiring comment is P–7, which is described (Br. 34) as

> P–7 Early 1871 mining map showing lake and location of General Connor's steamship routes on the lake (T. 32).

The description is accurate; what we wish to point out is that General Connor's one steamboat, the *Kate Connor,* was no longer owned by him in 1872—one year after the date of the map. (And, as we have noted, there are many allusions in the evidence to the sinking of this boat in 1871.) Whether his two other boats, the "Pioneer" and the "Pluribustah," were still on the lake in 1871, and under his control, is unknown.

11. Page 2A of Exhibit 8 (Br. 34) is described as

> Page 2–A Account of large shipments of railroad ties on the lake in 1869.

The words "shipments" should be singular; it is an account of one shipment only, and, as a matter of fact, there was only one such shipment in the history of the Lake. Ex. D–3, p. 191.

12. The summary of page 2–B of Exhibit 8 (Br. 34) is:

> Page 2–B Account of the late 1860's and early 1870's where steamboats shipped "great quantities of ore" from south end of lake to northeast part

of lake, and excursion boats capable of carrying 300 passengers.

What Mildred Mercer actually wrote in this account was, first, that "the Tooele county mines were producing great quantities of ore" and second, that "a steamboat, *City of Corinne*, had been built to haul ore and passengers from a spot near Black Rock to Corinne, across Great Salt Lake." Both of these statements are correct: great quantities of ore were produced, and the steamboat was built to carry them. But Mrs. Mercer to her credit did *not* say that the steamboat actually carried great quantities of ore, or any quantities of ore, and as we have seen from our review of the evidence, the steamboats on the Lake, although built to carry ore, were soon diverted to other uses.

13. The summarization of pages 3 to 5 of Exhibit 8 (Br. 34 and 35) is:

> Pages 3–5 Newspaper advertisements in 1875 and 1876 promoting commercial passenger service on ship "General Garfield." The advertisements also reflect the variety and volume of commercial shipments, e.g., on page 4: "On and after August 1st the regular rates on Ore, Bullion, Coke, Charcoal and Coal will be $2.15 per ton between Salt Lake City and Halfway House in lots of not less than 12,000 lbs. loaded and unloaded by the company, and $2.00 per ton when not loaded or unloaded by the company. Freight for the west will be received on weekdays only from 7 a.m. to 10 a.m. and forwarded the same day, while that received from 10 a.m. to 6 p.m. wil [sic] be forwarded the next day. For any further information concerning freight, apply to J. N. Pike, Gen'l Freight Agent, G. W. Thatcher, Gen'l Passenger Agent, H. P. Kimball, Gen'l Superintendent."

The State's summarization of the document which constitutes page 4 of Exhibit 8 is grossly misleading, as can be determined by even the most casual examination of the document itself, which is an advertisement placed by the Utah Western Railway; the rates given for the transportation of freight are rates for transportation *by train* from Salt Lake City to Halfway House, and the rates are given in terms of *car lots* which is, of course, a term having a special meaning for the freighting of goods by rails. The word "car" in the phrase "car lots" is omitted from the State of Utah's purported quotation of the advertisement.

It is clear from the advertisement appearing on page 5 of Utah's Exhibit 8 that Halfway House was not a stop on the Lake, but a stop some distance from the Lake, and that the stop on the Utah Western Railway's line where the connection with the steamer was made was at Lake Point. It should also be noted that the connection with the steamer was not to permit passengers to continue on their trip to some destination, but only to afford them the opportunity of taking an excursion on the Lake "returning in time for the train arriving at Salt Lake City at 7 p.m." It is equally clear, from the fact that no rates are quoted for freight only to Lake Point, that Lake Point in fact was not a place where freight was loaded or unloaded onto the train. Indeed, that the train carried "Ore, Bullion, Coke, Charcoal and Coal" undoubtedly explains to some extent why there was not any significant carriage of freight on the Lake.

14. Utah's characterization of page 9 of its Exhibit 8 (Br. 35) continues this misconception; the State says page 9 contains:

> Page 9 Photographs of steamship "General Garfield" and shipping dock at Halfway House near Lake Point.

To the extent that there is an identification of the place where the photographs on page 9 of Exhibit 8 were taken, the pictures are clearly shown to have been taken at Lake Point, which is, of course, where the excursionists transferred from the railroad to the boat. There is no reference anywhere in evidence which would put the site depicted in the photograph at Halfway House—Halfway House being, as page 3 of the Plaintiff's Exhibit 8 shows, the place where the train connected with the Stages for Stockton, Ophir and Dry Canyon, and where the freight was transferred to the Stages. Thereis no explanation in the State's brief of the identification of these pictures as having been taken at Halfway House; there is merely the bald assertion that these pictures show the General Garfield at Halfway House. The State has seriously erred in representing the evidence as showing the carriage by the General Garfield in 1875 of "Ore, Bullion, Coke, Charcoal and Coal."

15. Exhibit P–40 is described as a

> P–40 Contract showing present mining and removal of lime sand for flux from Stansbury Island on Great Salt Lake (T. 285).

The description is correct; the only point to be made here is that this "island" is actually, for the most part, and in fact, at the present time, a peninsula connected with the mainland (Ex. D–3, p. 171).

16. Two minor corrections in the descriptions of the Exhibits may also be noted: Exhibit P–2 (Br. 33) shows the levels of Great Salt Lake from 1850 to the present time; Exhibit D–2 (Br. 41) was not prepared by the United States Geological Survey, but by the Utah Geological and Mineralogical Survey.

APPENDIX 6

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8. A Journey to Great-Salt-Lake City:
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9. Christopher Layton:
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10. Tourists' Guide Book to Salt Lake City:
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11. The Resources and Attractions of the Territory of Utah:
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13. Utah Gazetteer and Directory of Logan, Ogden, Provo and Salt Lake City, for 1884:
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16. The Resources and Attractions of Utah:
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26. Through the Heart of the Scenic West:
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27. Utah—Resources and Activities:
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35. The Great Salt Lake:
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36. Stansbury's Survey of the Inland Sea:
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Item J. Letter to Secretary of Army dated 25 Jun 51 from Chief of Engineers, Subject: Great Salt Lake, at or near Garfield, Utah ---------- 2

Item K. Corp of Engineers form 1118, dated 20 Jun 51, with accompanying papers:

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2. Copy of letter, State of Utah to Office of Chief of Engineers, 5 Jun 51 (dup.) ---------- 1
3. Copy of letter, Department of Interior to Office of Chief of Engineers, 21 May 51 (dup.) -- 1

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 31, Original

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE UNITED STATES

1. Utah has filed a brief which reargues matters in issue before the Special Master, but not put before this Court. The United States did not except to any of the Master's factual conclusions, as such. Only two of its exceptions were to findings which the Master styled "Findings of Fact," and in each instance the gravamen of the exception was that the finding embodied an erroneous application of governing law—that is, that the finding was one of mixed law and fact, in which the law had been misdefined or misapplied. Since we accept the Master's findings of fact as such, all the discussion of our brief is based upon those findings and has reference to them. Utah, on the other hand, seeks to reargue the transcript and record before the Master, presenting to this Court as it presented to

him an advocate's view of what the proof entailed.[1] Particularly since Utah has filed no exceptions to the Master's Report, but rather "fully supports" it (Br. 129), its effort to have this Court reassess the weight of the evidence and similar matters, Br. 34–48, is out of place. There are, of course, responses which can be made to the characterizations which Utah has sought to place upon the record. The United States' view of that record was contained in its brief before the Special Master, and in light of the nature of Utah's argument in this Court, sixty copies thereof have been filed as a supplement to this reply brief. We believe, however, that the Court need not involve itself in these matters, but may restrict its consideration to the facts as found by the Special Master.

2. The United States believes that the facts found by the Special Master require the conclusion that the Great Salt Lake was *not* navigable in fact on the date of Utah's statehood, because the geographical characteristics of the Lake presented substantial obstacles that made it not susceptible of being used, in its "ordinary conditions," as a highway for commerce, trade and travel. *The Daniel Ball,* 10 Wall. 557, 563. If, as the Master found, such obstacles to use exist, it is irrelevant that they might be overcome by the

[1] For example, compare pp. 22–26 of Utah's brief with its proposed findings of fact, pp. 47–51 of its brief before the Master; and the Appendix "Summary of Evidence" pp. A–1 to A–26 with pp. 15–41 of the brief before the Master. The "Facts Showing Useful Navigable Capacity of Great Salt Lake," Br. 56–58, are all based on Utah's view of the transcript rather than the Master's findings.

dredging of lengthy channels or the building of enormous piers. A waterway, to be navigable, must "be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means." *Harrison* v. *Fite*, 148 Fed. 781, 783–784; *United States* v. *Utah*, 283 U.S. 64, 87; *United States* v. *Holt State Bank*, 270 U.S. 49, 56. Thus, we have excepted to Finding of Fact 31, which finds the Lake navigable, and to Finding of Fact 62, which appears to consider legally relevant the fact that the serious obstacles to commercial navigation on the Lake might be overcome by improvements such as dredged harbors (Finding of Fact 63(a)) if a commercial need arose.

There can be no doubt that the Master found serious obstacles to use of the Lake as a highway of commerce in its "ordinary conditions." "The Lake has throughout its perimeter, except in a few places, unusually gentle inclining shores." (Finding of Fact 8, R. 13). "The shore for the most part has a slope of less than one foot in 1,000 feet. A rise of a few feet in the water level will inundate great areas of land surrounding it, and a similar drop will leave large areas uncovered." (Finding of Fact 11, R. 17). "Except for an area at the southeastern shore * * * the Lake is surrounded by stretches of salt flats, marshes or bogs, some of which are in places several miles in width." (Finding of Fact 18, R. 21; see also Finding of Fact 26, R. 27). "The gradual shelving of the basin and the softness of the shore surface make it unusually difficult to get boats from dry land into floatable water. To reach water five feet deep, one must move

out a mile or more from the water's edge." (Finding of Fact 26, R. 25). "Convenient locations for launching and landing of boats are not to be found on the Lake." (*Id.*, R. 26).

Even if the water level of the Lake were stable, such facts—viewed against a history of non-use for commercial transportation (Finding of Fact 52, R. 44) and the extensive settlement of the Lake's environs (Finding of Fact 19, R. 21)—would show that the Lake did not meet the test of *The Daniel Ball*. But the level is not stable; in addition to its unpredictable rise and fall over the long term (Findings of Fact 13, 33, R. 18, 31–32), it experiences an average annual rise and fall of almost two feet (Finding of Fact 15, R. 19). While this variation seems negligible in its vertical dimension, it means a difference of over one-third of a mile in the location of the shoreline because of the gradual slope. A 4,000 ft. pier built out into the Lake in 1893 (Finding of Fact 21, R. 23) has long been "a desolate spot several miles inland" (Finding of Fact 61(c), R. 48; see also Finding of Fact 37, R. 35). The harbor which housed the dredges and boats for construction of the Southern Pacific Causeway, on which the State so heavily relies, required a channel two and one-half miles long to reach deep water; this was one of only two harbors on the Lake (Finding of Fact 39, R. 37–38). When such enormous piers or channels are required to reach floatable waters, and these in turn may be rendered useless by the "unpredictability of the Lake's level and waterline" (Finding of Fact 61(c), R. 48), then

it is established in our view that the "natural and ordinary condition" of the Lake is not such that it "affords a channel for useful commerce," *United States* v. *Holt State Bank, supra,* 220 U.S. at 56, whatever the capacity of the deep water of the Lake to float marine craft.

This is not a case like the prior *Utah* case, *supra,* "where conditions of exploration and settlement explain the infrequency or limited nature of [commercial] use." 283 U.S. at 82. The area near the Lake was already settled at statehood, and has been heavily populated ever since; but "Commerce and trade * * * has not flourished on the Lake," and future utilization not only awaits future demands, but also requires "future improvements." (Finding of Fact 62, R. 48–49). In this respect, the Lake more closely resembles a part of the Red River which this Court found not navigable in *Oklahoma* v. *Texas,* 258 U.S. 574, 589–591. In this portion of the river, water depths varied from six inches to three feet; the river had been used for light transportation, but was abandoned when alternate modes of transportation were available, and the Court concluded that it had insufficient capacity in its "natural and ordinary condition" for any but exceptional use. Similar depths—shallower than those found navigable in the prior *Utah* case and *Holt State Bank*—usually extend over a half mile from the Lake's shores (Findings of Fact 11, 25, R. 17, 26). The fact that a ditch may be dug through these shallows to alleviate the difficulty does not make the Lake navigable. *Egan* v. *Hart,* 165 U.S. 188, 193; *Leovy* v.

United States, 177 U.S. 621, 629; see also *The Montello*, 20 Wall. 430, 440–442; *United States* v. *Cress*, 243 U.S. 316, 321.

A lake circumscribed by such shallows, whose boundaries vary widely with slight variations in water level, does not lend itself to "commerce of a substantial and permanent character." *Leovy, supra*, 177 U.S. at 632. Indeed, the Master did *not* find that the Lake was actually in use as a highway of commerce on the date Utah was admitted to statehood. He bases his conclusion solely on a finding that the Lake was "capable,' or susceptible of such use (Finding of Fact 31, R. 29)—a finding which has not been borne out by experience in the seventy-five years of Utah's statehood and which is based in part on the erroneous view that the possibility of "future improvements" (Finding of Fact 62, R. 49) can contribute to navigability. While a number of boats have been used on the Lake, most were for brief periods of time and specific noncommercial purposes, such as construction of the railroad causeways; the number is slight in relation to the Lake's size, the population around it, and the time period involved.[2] "Not counting excursion trips, the

[2] Only seven of these boats could be thought to have been engaged in trade or travel in the customary mode of trade or travel on water; their trade was sporadic, their careers, short, and all disappeared from the Lake by 1888—well before Utah became a State and a time when the level of the Lake was substantially higher, and its shoreline more accessible, than it has been ever since. A complete listing and analysis of the boats on the Lake and their uses appears in the United States' brief before the Special Master, filed herewith, at pp. 10–20 and 43–64.

boating uses of the Lake have been more of a private nature rather than by independent contractors for hire" (Finding of Fact 51, R. 43). "There was no evidence to show that any regularly scheduled freight or passenger service operated on the Lake" (Finding of Fact 52, R. 44), again despite its extensive size, its mineral development, and the heavily populated areas near its shores. In these circumstances the susceptibility test of the prior *Utah* case does not apply.

We conclude that the Lake was not susceptible of use as a channel for useful commerce in its "ordinary conditions"[3] at Utah's statehood. In any event, the Master applied an erroneous test to the evidence in considering the possibility of "future improvements" and discounting the history of actual disuse as a channel of commerce and trade. Even if the United States were not entitled to judgment on the present findings, it would be entitled to have the evidence reconsidered in accordance with a proper view of the law applicable to the case.

3. The United States' second argument is that this Court should reconsider its unexplained holding in the prior *Utah* decision that title to the beds of intrastate as well as interstate waters passes to the States on statehood if the waters are navigable in fact. Utah devotes the great bulk of its brief to this

[3] It should be clear that the United States has never conceded this issue, as Utah claims at p. 8 of its brief. We have consistently acknowledged that large boats could float in the central deep waters of the Lake, but deny for the reasons set out above and in our main brief that this suffices to show the susceptibility of the Lake to support commerce.

contention, but in our view substantially misstates the issues and the underlying law.

a. The United States preserved the issue. At the outset of the hearing, in language which Utah has quoted but not chosen to italicize, Utah Br. 109, counsel for the United States stated:

> If that test [that it has to be interstate] was used in the Great Salt Lake, we would win right away because Great Salt Lake is entirely within one state. We assume—We don't insist upon that criteria, however, your Honor, but we would like it if your Honor would accept it. * * *

The reason for not insisting was that, in light of this Court's prior *Utah* decision, the Master had no authority to adopt that rule. Utah now suggests that it might have introduced evidence of the Lake's interstate navigability; but it would hardly have omitted such proof in showing intrastate navigability, and fails to suggest what the evidence might be. Compare Exh. P–32, p. 33.

b. Utah asserts that "the original states certainly had proprietary ownership of the beds of their navigable intrastate waters," Br. 127, and then argues on the basis of the equal footing doctrine that it too must be afforded that right.

If Utah is advisedly speaking of *proprietary* ownership, the doctrine of equality among the states has no application. At the formation of the Union, the original states had proprietary ownership of all vacant lands within their boundaries. But it could not be suggested that, for this reason, the equal footing doc-

trine entitled new states as they were formed to assume proprietorship of all their vacant lands, which until then had been held by the United States. The United States' proprietary interests in those lands continued. Similarly, while the original states may have had proprietary ownership of the *vacant* beds of fresh water navigable and non-navigable streams—and we show below that title to river-beds and lake-beds generally passed with title to riparian lands in the original states—it does not at all follow that the equal footing doctrine entitled new states to assume a proprietary interest in the beds of their navigable and non-navigable streams; those rights remained with the proprietor of the adjoining lands, which most often was the United States.

But Utah may be asserting that the original states had *sovereign* rights in the beds of their navigable intrastate waters. If this were true, then the equal footing doctrine would entitle Utah to similar rights in its waters—and that is the root of our argument. For Utah is entitled as a matter of inherent sovereign right to neither more nor less than the original states possessed in such right when they formed the Union. Utah Br. 86–89. And the original states had no sovereign interest in the beds of their navigable intrastate waters, unless such an interest was created by statute.

The common law at the time recognized sovereign ownership of underwater lands only in bodies of water affected by the tides. *The Steamboat Thomas Jefferson,* 10 Wheat. 428. Such bodies, if navigable, were necessarily interstate waters, permitting commerce to other states and to foreign nations to be carried upon them.

This Court twice pointed out that no more than three of the original States (Pennsylvania, Virginia and North Carolina) denied riparian owners their common-law right to the beds of navigable, non-tidal waterways. *Shively* v. *Bowlby*, 152 U.S. 1, 31; *Hardin* v. *Jordan*, 140 U.S. 371, 393 *et seq.* Massachusetts, which early passed a statute reserving the beds of *unappropriated* "great ponds" in common, Lawes and Libertyes of Massachusetts (Cambridge, 1660), p. 50, reprinted in Massachusetts Colonial Laws (Boston, 1889), p. 170, continued in the absence of statute to recognize private ownership of the beds of non-tidal, navigable streams, subject only to a right of passage. *Brosnan* v. *Gage*, 240 Mass. 113, 118. Similarly, public ownership of a river-bed in Pennsylvania depended on a prior declaration of its navigable status; where a grant or sale of the river-bed had been made before it was declared a public highway, the private ownership rights controlled. *Coovert* v. *O'Connor*, 8 Watts (Pa.) 470. Although Utah asserts the contrary (Br. 127), New York has always followed the common law rule of riparian ownership, subject to public rights of access and passage, save where specific exceptions were made. *Fulton L., H. & P. Co.* v. *State of N.Y.*, 200 N.Y. 400, 412–414.

As set out in our main brief, the public lands of the United States may be divested from it only as authorized by Congress or required by the Constitution. We do not believe Congress has acted in this case. And if the original states did not own the beds of their fresh-water rivers and lakes as a matter of inherent sovereignty, then the Constitution does not

require the United States to give up its ownership of similar underwater lands in order to give new states "equal footing." Like the dry lands which surrounded them, such lands would remain in the public ownership of the United States. To hold the contrary is to take the step which this Court refused in *United States* v. *Texas,* 339 U.S. 707, and to confer on the new states rights which the original states never enjoyed.

c. So far as lands underlying navigable waters of the United States—*i.e.,* waters forming part of a channel of interstate or foreign commerce—are concerned, application of the equal footing doctrine was required if only to promote uniform treatment of the lands underlying waters subject to federal regulatory jurisdiction. The initial expansion of the navigability concept occurred in the setting of federal maritime and commercial jurisdiction. In a land of great, interconnected rivers and lakes, it appeared to be unwarranted to base distinctions governing federal power on the extent of the tide's influence. *The Propeller Genesee Chief* v. *Fitzhugh,* 12 How. 433; *The Daniel Ball,* 10 Wall. 557. The Court easily made the transition to the proposition that ownership of the beds of waters "amenable to the admiralty jurisdiction," even though not tidal, "properly belongs to the States by their inherent sovereignty," *Barney* v. *Keokuk,* 94 U.S. 324, 338, albeit without considering that no such claim had been made by the original states. The result was that the consequences of federal navigability were uniform; the beds of all federally navigable waterways belonged, by inherent right, to the states.

No such uniformity was promoted, however, by the unexplained extension of that holding in the prior *Utah* case to lands which are not interconnected as part of a highway of interstate or foreign commerce. At least since the demise of *Swift* v. *Tyson* (*Erie R. Co.* v. *Tompkins,* 304 U.S. 64), the federal definition of what constitutes state navigable waters has become surplusage for all purposes other than the possible transfer of federal lands under the *Utah* rule. There are very few such waterways of any size. From the national perspective, the ownership of the beds of these bodies of water is a matter of indifference for any regulatory purpose; by definition, these bodies are not interconnected with routes of national or international trade subject to federal authority or protection, and the great insights of *The Daniel Ball* and *The Genesee Chief* do not apply. On the other hand, the *Utah* rule quite possibly promotes dispute, rather than quiet, on title issues. There are many smaller bodies of water, or portions thereof, which are arguably "susceptible" of use as a channel of intrastate commerce within the very permissive standards of the *Utah* holding. Separating title to the bed from title to the shores of such bodies is questionable public policy as well as unwarranted, as has been seen, by the equal footing doctrine.

d. The many consequences which the State supposes will follow from an overruling of the prior *Utah* decision are illusory. Rights of navigation and access would continue to be assured by the common-law easements which were and are the sole basis of state authority in most of the original states, and in the

many other states which follow the common-law rule and have conferred on riparian owners the title received from the United States upon statehood. See, *e.g.*, *Barney* v. *Keokuk*, *supra*; *Adams* v. *Pease*, 2 Conn. 481, 483–485. It is no more impractical for the states to control navigation over lands owned by the United States in its proprietary capacity than it is for the United States to exercise similar control over navigation on interstate waters, whose beds may be owned by the states. Since the underwater lands are not reserved as a matter of inherent sovereign right, a sale of the riparian lands would carry them with it or not according to the form of the sale, without regard to any doctrine of implied reservation. Against the possibility that overruling *Utah* might unsettle title on the few large bodies of intrastate navigable water must be balanced the uncertainty that would result in the probably greater number of bodies where navigability could be in dispute under the *Utah* rule. Again, we note that Utah's distress appears to be based on a faulty premise: the United States could not deny title to underwater lands which it had held in a purely proprietary capacity, if the form of sale of adjoining riparian lands was such as would ordinarily carry those lands with it; and except as to the largest bodies of water, in most states title to underwater lands passes into private hands whenever riparian lands are sold.

The governing consideration, in our view, is as Utah itself has stated. The State received from the United States at statehood only those underwater lands which corresponded to lands the original states possessed as

a matter of inherent sovereign right. The doctrine of equality among states entitled it to neither less nor more. And the original states' sovereign interest was limited to lands under waters affected by the tides or, at the very most, under waters which were a part of the great national system of commerce and trade.

e. There remains the question whether passage of the Submerged Lands Act has mooted the issue. That Act confirms in state ownership only those waters which are navigable "under the laws of the United States," and the question is whether, as we have asserted, Congress thus limited its action to the navigable waters of the United States, over which it frequently exercises its regulatory authority by the passage of national statutes, or whether it meant the phrase to encompass all waters navigable at common law, interstate or intrastate, under the test of *The Daniel Ball*.

The legislative history is not fully conclusive on the point. The House and Senate Reports on the Act reflect apprehension that this Court's ruling in *United States* v. *California*, 332 U.S. 19, might lead to an overruling of *Barney* v. *Keokuk* or *Pollard* v. *Hagan*, 3 How. 212, and a purpose to prevent any such development by confirming existing state title. *E.g.*, S. Rep. No. 133, 83d Cong., 1st Sess. 6–7 (1953); H. Rep. No. 215, 83 Cong., 1st Sess. 15 (1953). A Senate Minority Report, in particular, appears to have felt the legislation would also confirm the prior *Utah* decision, since it specifically mentions the Colorado River in that State. S. Rep. No. 133, *supra*, Pt. 2, at 18–19. And a letter written by the then Solicitor General, Philip

Perlman, in opposition to the grant of offshore lands, attached to the minority report as an appendix, assures that the government had no claims to inland navigable waters; the letter did not discriminate between intrastate and interstate navigability. *Id.* at 19–20; 21; 117; 119. While there was unanimity between the majority and minority reports on the desirability of confirming existing state title, however, it is also clear that Congress wished to bring about that confirmation on the assumption that title to the lands was in fact a matter of state right. There was no purpose to grant additional lands to the states in cases where, in Congress' view, the Constitution did not require it. And the reports do not focus particularly on the *Utah* principle as correct, or the subject of ratification by the Act.

The language of the statute itself is plausibly interpreted as referring to the concept with which Congress was most intimately familiar—the navigable waterways over which it possessed regulatory authority and to which the admiralty jurisdiction applied. If, as we have shown, the decision in the prior *Utah* case resulted from a misapplication of the equal footing principle, the language should be so interpreted in this case, and that decision should be overruled.

For these reasons and the reasons set forth in our principal brief, the Report of the Special Master should be revised, the Great Salt Lake should be found not to have been navigable on the date of Utah's admission to the Union, and judgment should be entered in favor of the United States; or else the

case should be remanded to the Master for reconsideration in accordance with this Court's opinion.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

MARTIN GREEN,
Attorney.

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IN THE

Supreme Court of the United States

No. 31, Original

OCTOBER TERM, 1967

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

REPORT OF SPECIAL MASTER

CHARLES FAHY,
Senior Circuit Judge,
Special Master.

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UNITED STATES OF AMERICA, DEFENDANT

REPORT OF SPECIAL MASTER

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. INTRODUCTION

This Report of the Special Master is concerned with another stage of the controversy between the State of Utah and the United States over the ownership of certain land, and its content, within the surveyed meander line [1] of the Great Salt Lake.

[1] The meander line of the Great Salt Lake is the line duly surveyed prior to and in accordance with section 1 of the Act of June 3, 1966, 80 Stat. 192, which provides:

> That the Secretary of the Interior shall within six months of the date of the passage of this Act complete the public land survey around the Great Salt Lake in the State of

Pursuant to the terms of the Act of Congress of June 3, 1966, 80 Stat. 192, as amended, 80 Stat. 349, the Secretary of the Interior on June 15, 1967, by quitclaim deed conveyed to Utah all interests of the United States in these lands, including brines and minerals in solution in the brines, or precipitated or extracted therefrom,[2] conditioned upon payment by Utah to the United States of the market value of the interests covered by the deed should it be determined that they actually belonged to the United States. To have that question judicially determined Utah adopted one of the alternative courses authorized by the Act by filing this original suit in the Supreme Court seeking a decree to quiet its title as against the United States to the lands and content in dispute. See section 5(b) of the Act.

Several phases of the over-all controversy have been decided by the Court. In *Utah* v. *United States*, 394 U.S. 89 (1969), the Court denied intervention of a private claimant, Morton International, Inc., approving the recommendation of the late Senior Circuit Judge J. Cullen Ganey, Special Master. In *Utah* v. *United States*, 403 U.S. 9 (1971), again on the basis of the Report of Judge Ganey, the Court held that the Lake was navigable when the State of Utah was admitted to the Union on January 4, 1896, and that, as a consequence, under the equal-footing doctrine,[3] title to the bed of the Lake at state-

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Utah by closing the meander line of that Lake, following as accurately as possible the mean high water mark of the Great Salt Lake used in fixing the meander line on either side of the unsurveyed area.

[2] When "land", "lands", "bed of the Lake" appear in this Report to describe the interests involved the words are used to include the brines and minerals in solution in the brines or precipitated or extracted therefrom.

[3] *Pollard's Lessee* v. *Hagen*, 44 U.S. (3 How.) 212, 221-23, 228-30 (1845); *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313

hood vested in Utah. Thereupon the Court, in *Utah* v. *United States*, 406 U.S. 484, entered its decree of May 22, 1972, in the form of an injunction against the United States, but in substance quieting in Utah, as against the United States, the title to the bed of the Lake lying below its water's edge on June 15, 1967, the date of the quitclaim deed, with exceptions not now material, and to the natural resources and living organisms therein or extracted therefrom. The Court also held that Utah is not required to pay the United States for the interests thus described in the decree.

The decree of May 22, 1972, by its paragraph 3, brings us to the present problem. It provides as follows:

> 3. The basic question yet to be determined in this case is whether prior to June 15, 1967, the claimed doctrine of reliction applies and, if so, whether the doctrine of reliction vests in the United States, and thus divests the State of Utah, of any right, title or interest to any or all of the exposed shorelands situated between the water's edge on June 15, 1967, and the meander line of the Great Salt Lake as duly surveyed prior to or in accordance with § 1 of the Act of June 3, 1966, 80 Stat. 192. A Special Master will be appointed by the Court to hold such hearings, take such evidence and conduct such proceedings as he deems appropriate and, in due course, to report his recommendations to the Court.

406 U.S., at 484-5. Judge Ganey in the meantime having died the Court appointed the present Special Master, with the authority thus noted. 406 U.S. 940 (1972).

(1973). Under this doctrine, in the absence of a congressional condition to the contrary, a State, upon its admission to the Union, acquires title to the bed of navigable waters within the State, as had the thirteen original colonies as successors to the rights of the British Crown.

Not at issue in this litigation are the claims of private persons, vendees and patentees, to about 275,000 acres adjacent to the Lake.

Following the decree of May 22, 1972, the parties engaged in a cooperative and successful effort to clarify and delineate the issues now considered. This was followed by a hearing before the Special Master at the United States Court House in the District of Columbia on February 27, 1973, at which a large number of exhibits were introduced in evidence, and oral testimony adduced. The exhibits incorporate detailed factual data regarding the Lake and its history, the accuracy of which is accepted by the parties.[4] Briefs followed and the case was taken under submission on October 25, 1973, for preparation of this Report. As it was nearing completion, however, the Court decided *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973), following which the parties have advised the Special Master of their views as to the bearing of *Bonelli* upon this case.

It is now important to note that, in accordance with the desire of both the United States and Utah, the basic question now considered is limited to whether the doctrine of reliction divested Utah of title to that part of the bed of the Lake at statehood which on June 15, 1967, the date of the quitclaim deed, had become exposed by recession of the waters of the Lake, comprising some 325,000 acres. *Infra*, p. 24. The title to any upland between the bed of the Lake at statehood and the meander line is not now considered, the positions of the parties in that regard being reserved pending the answer to the above question.

II. Summary of Recommended Conclusions

The Special Master recommends that the Court hold that the State of Utah has not been divested by reason

[4] Reproduced as part of this Report are Plaintiff's Exhibits 4, 5, 9, 10, 11, 12 and 17, and Defendant's Exhibits 2, 3 and 6. The originals of all the Exhibits are on file with the Clerk of the Court.

of the doctrine of reliction of any right, title or interest to that part of the bed of the Great Salt Lake acquired by it at statehood which had become exposed by recession of the waters of the Lake to June 15, 1967; that Utah is entitled to a decree quieting its title as against the United States to the area thus described insofar as any claim thereto by the United States rests upon the doctrine of reliction; and that no compensation is due from the State of Utah to the United States under the Act of June 3, 1966, for said area.

III. Federal Law Controls

Under the recent decision of the Court in *Bonelli*, *supra*, it seems clear that federal law governs the decision of this case. The land, title to which was in dispute in *Bonelli*, abutted the Colorado River, a navigable stream. Title to the bed of the river had been acquired by Arizona at statehood under the equal-footing doctrine. The riparian owner, Bonelli Cattle Company, held title which stemmed from a federal patent.[5] Prior to the litigation the river by erosion had inundated part of the Bonelli land, thus extending the river bed eastward. Thereafter the United States, with the acquiescence of Arizona, rechanneled the river for navigational purposes and caused the eroded area to be reexposed. Bonelli Cattle Company as the riparian landowner claimed the exposed area under the doctrine of accretion. The Court held that this question was to be decided under the federal common law of accretion, not under state law. It follows, in the view of the Special Master, that the related question of reliction as now presented must also be decided under federal

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[5] In *Bonelli* the claimant against the State under the doctrine of accretion held title under a federal patent to a predecessor in title; but it was not clear whether the land covered by the patent was riparian at the date of the patent. *See* 414 U.S. at 321, n.11.

law. As with respect to Arizona in *Bonelli*, so with respect to Utah now, the title of each State accrued under the equal-footing doctrine, and the riparian owner in each case claims title to the upland under the United States.

The Court held in *Bonelli:*

> We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign; but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act—whether the State retains title to the lands formerly beneath the stream of the Colorado River or whether that title is defeasible by the withdrawal of those waters. As this Court observed in *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935): "The question as to the extent of this federal grant, that is as to the limit of the land conveyed, . . . is necessarily a federal question. . . . [I]t involves the ascertainment of the essential basis of a right asserted under federal law."

414 U.S. at 319-20.

While the United States is free to adopt or to acquiesce in the application of state law even though otherwise federal law would govern,[6] the Court in *Bonelli* held that it had not done so by the Submerged Lands Act, 43 U.S.C. §§ 1301, *et seq.*, so holding in terms which the Special Master considers applicable as well to the present case:

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[6] *United States* v. *Oregon*, 295 U.S. 1, 28 (1935); *Hughes* v. *Washington*, 389 U.S. 290, 292-93 (1967).

> The [Submerged Lands] Act did not abrogate the federal law of accretion, but defined lands beneath navigable waters as being those covered by streams as "hereafter modified by accretion, erosion, and reliction." . . . Since the Act does not extend to the States any interest beyond those afforded by the equal-footing doctrine, the State can no more base its claim to lands unnecessary to a navigational purpose on the Submerged Lands Act than on that doctrine. (Footnote omitted.)[7]

414 U.S. at 324-25.

IV. History and General Characteristics of the Great Salt Lake

The Report of Special Master Ganey, filed October 26, 1970, contains in considerable detail the history and characteristics of the Lake. These are now outlined, beginning with the testimony before the present Special Master on February 27, 1973, of Mr. Theodore Arnow,[8] a joint expert witness. He described the Lake as located entirely within Utah and as a remnant of the ancient Bonneville Lake, one of the last major lakes formed in geological time in the Great Basin.[9] Before it began to dry

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[7] By analogous reasoning the reliance of the State upon the Rules of Decision Act, 28 U.S.C. § 1652, cannot be accepted as a basis for applying state law in light of *Bonelli*, all else aside. It was not applied in either *Hughes* v. *Washington*, *supra*, or *Bonelli*.

[8] Mr. Arnow is the District Chief of the Water Resources Division of the Geological Survey in Utah charged with the responsibility of gathering statistical data regarding the Lake.

[9] The Great Basin is located in Western Utah, most of Nevada and smaller parts of other States. Although the climate in the Great Basin is now arid with less precipitation than evaporation, many centuries ago the climate was more humid so that lakes which formed there would in alternate periods dry up and then form once again.

up over 20,000 years ago Lake Bonneville covered approximately 35,000 square miles, about the size of Lake Superior and twenty times the area of the Great Salt Lake. The Great Salt Lake is about 70 miles long and 30 miles wide, with a volume of 15,000,000 acre-feet covering about 1,650 square miles. Its maximum depth is 34 feet. The Lake is surrounded by very flat shorelands except where mountain ranges project upward through the water.[10] The flat shorelands are vast mud flats barren of any vegetation due to the high salinity of the Lake, and are used for nothing except recreation and as evaporation ponds for extracting minerals and salts. (Tr. 33.) A visual illustration of the general nature of the mud flats can be obtained from Exhibit P-6 which contains twelve color photographs of the shore as it appeared on February 12, 1972, when covered with snow. The Exhibit also contains twenty-four black and white photographs showing the mud flats as they appeared on October 26, 1972, with no snow. Both sets of photographs contain maps showing the location of each photograph and a description of the view illustrated.

The Lake has no outlet and thus no way of discharging the water which it receives by the inflow of tributary streams and by precipitation. The water level also is influenced by man-made interferences with the rate of inflow.[11] The only "outflow" from the Lake is by evaporation. (Tr. 36.)

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[10] Judge Ganey's Report filed October 26, 1970, states in his Finding No. 18, p. 21, in part as follows:

> Except for an area at the southeastern shore near the base of the Oquirrh Mountains, where the beaches are located, the Lake is surrounded by stretches of salt flats, marshes or bogs, some of which are in places several miles in width. (Footnote omitted.)

[11] Exhibit P-18 demonstrates that the Lake would be at a higher vertical elevation if man had not interfered with the

The rate of evaporation and the resulting changes in the elevation of the Lake depend upon wind, temperature, salinity of the water and the surface area of the Lake, which is affected by the rate of tributary inflow and the degree of salinity. The periods of maximum inflow, the late fall and the spring, precede the period of maximum evaporation, during the summer. The Lake is continually fluctuating due to these interrelated factors.

Records of the Lake were kept first by the Mormons who arrived in the area in 1847, Mr. Arnow continued. At that time the elevation of the Lake was approximately 4200 feet above sea level.[12] Exhibit P-4. At statehood in 1896 the elevation of the Lake was 4200.2 feet. In February, 1973, at the time of the hearing before the Special Master, the elevation was approximately 4200 feet, within a few inches of the statehood figure. (Tr. 37-38; Exhibit P-4. And see Tr. 18; Post-Trial Brief of United States, p. 19, n.13.) Therefore, in February, 1973, the relation of the waters of the Lake to the adjoining shorelands was about as it was at statehood, quite different from what it was on June 15, 1967, the date of the quitclaim deed.

Since statehood the Lake has fluctuated as much as thirteen feet from a high of 4205 feet in 1924 to a low of 4192 feet in 1963.[13] The fluctuations have followed no set pattern on either a long range or short range basis, whether measured at five year intervals, one year inter-

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natural rate of inflow. However, this does not change the nature of the fluctuations of the water level which would still fluctuate as dramatically and frequently but at a higher elevation.

[12] In noting at different places in this Report the level or elevation of the Lake the numerals in each instance refer to "above sea level."

[13] The Lake reached its highest elevation in 1873, prior to statehood, when its level rose to 4212 feet. *See* Exhibit P-4.

vals, six month intervals, monthly intervals, or even daily or hourly intervals. See Exhibits P-8—P-17.

Special reference is made by the Special Master to the map marked as Exhibit D-2. The area of the bed of the Lake exposed between statehood and the date of the quitclaim deed is shown in the dark shading, dark blue in the original. The large light area represents the bed at the date of the quitclaim deed, light blue in the original. The area between the bed of the Lake at statehood and the surveyed meander line is the exterior medium shading, green in the original.

V. Factual Characteristics of the Reliction Process

The land of a riparian owner may be affected by the action of the water by avulsion, erosion, accretion and reliction. Neither avulsion nor erosion is involved. The former occurs when there is a sudden or violent change in the course of a stream, in which event the title lines remain as before. *County of St. Clair* v. *Lovingston*, 90 U.S. (23 Wall.) 46, 68 (1874); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624-25 (1912); *Bonelli*, *supra*, 414 U.S. at 327. Erosion is the gradual washing away of land by the water, thus extending its bed and simultaneously contracting the riparian land. See *Arkansas* v. *Tennessee*, 246 U.S. 158, 173 (1918); *United States* v. *461.42 Acres of Land*, 222 F.Supp. 55 (N.D. Ohio, 1963).

At common law accretion was the enlargement of the riparian land by the action of the water in gradually and imperceptibly depositing soil. See *Mississippi* v. *Arkansas*, — U.S. — (February 26, 1974). Reliction had this common characteristic of a gradual and imperceptible change in the relation of the water to the land, but by uncovering existing land rather than, as in accretion, depositing additional soil. The Court in *Bonelli* affirmed these characteristics of accretion and reliction:

> Federal law recognizes the doctrine of accretion whereby the "grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore." *Hughes* v. *Washington*, 389 U.S. 290, 293 (1967); accord, *Jones* v. *Johnson*, 18 How. 150, 156 (1856). When there is a gradual and imperceptible accumulation of land on a navigable riverbank, by way of alluvion or reliction, the riparian owner is the beneficiary of title to the surfaced land:
>
> > "It is the established rule that the riparian proprietor of land bounded by a stream, the banks of which are changed by the gradual and imperceptible process of accretion or erosion, continues to hold the stream as his boundary; if his land is increased he is not accountable for the gain, and if it is diminished he has no recourse for the loss." *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624 (1912).

414 U.S. at 325-26.

As had been stated in *Hughes* v. *Washington*, *supra*, 389 U.S. at 293, land gained by accretion is "by little and little, by small and imperceptible degrees," and belongs to the riparian owner. The Court continued:

> The Court has repeatedly reaffirmed this rule, *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178 (1890), and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. (Footnote omitted.)

The earlier English case of *The King* v. *Lord Yarborough*, 107 Eng.Rep. 668 (K.B. 1824), states the common law principle. The claim was that the land in dispute "being slowly, gradually, and by imperceptible increase, in long time cast up, deposited, and settled by and from the flux and reflux of the tide and water of the sea"

upon the "extremity of the demesne lands of the manor, [the projection] hath been formed, and hath been settled, grown, and accrued upon . . . the demesne lands. . . ." *Id.* at 673.

The court there held,

> It is clear upon the evidence, that the land has been formed slowly and gradually in the way mentioned in the plea . . . [a]nd considering the word "imperceptible" in this issue, as connected with the words "slow and gradual," we think it must be understood as expressive only of the manner of the accretion, as the words undoubtedly are, and as meaning imperceptible in its progress, not imperceptible after a long lapse of time. . . .

Id. at 674.

It is interesting to compare this statement of 1824 with that of the Supreme Court of Utah in 1971 in *Utah* v. *Hardy*, 26 Utah 2d 143, 486 P.2d 391. Although Utah law does not govern this case, the United States in its brief before the Special Master recognizes that the opinion of the Supreme Court of Utah defines reliction "in terms perfectly consonant with the federal common law":

> The doctrine of "reliction" in the law covers the situation involving the title to the land which emerges from beneath a body of water caused by a recession of the waters. The law of reliction is generally the same as that of accretion as it concerns contiguity, imperceptibility and naturalness of the process of the water's recession and the exposure of additional land. The law of reliction, as well as accretion, has evolved over a long period of time and is based upon the rights of a riparian owner to have access to the water adjacent to his property.

26 Utah 2d at 144-45, 486 P.2d at 392-93. The court held, however, after reviewing the "unique and special conditions" affecting Great Salt Lake,

> . . . that the recession of the waters from the land [there in question] has not been natural, gradual

> and imperceptible, and that the doctrine of reliction should not be applied.

26 Utah 2d at 145, 486 P.2d at 393.

It is now clear, however, from *Bonelli* that under federal common law though accretion may occur as formerly by the gradual and imperceptible process which evolved under the non-federal common law, it may also occur in a perceptible manner at least where the owner of the bed of the navigable water is a State which acquired title to the bed under the equal-footing doctrine. In this regard the Court in *Bonelli* holds:

> The [earlier] advance of the Colorado's waters divested the title of the upland owners in favor of the State in order to guarantee full public enjoyment of the watercourse. But, when the water receded from the land, there was no longer a public benefit to be protected; consequently, the State, as sovereign, has no need for title. That the course of the recession was artificial, or that the rate was perceptible, should be of no effect.[14]

414 U.S. at 323-24.

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[14] We have seen that some decisions refer to accretion or reliction as an addition to land by natural causes:

> A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore.

Hughes v. *Washington*, *supra*, 389 U.S. at 293; *and see Jones* v. *Johnston*, 59 U.S. (18 How.) 150, 158 (1856), both referred to in *Bonnelli*, 414 U.S. at 325; *Utah* v. *Hardy*, *supra*, 26 Utah 2d at 144-45, 486 P.2d at 392-93. *But see County of St. Clair* v. *Lovingston*, *supra*, also cited in *Bonelli* at 327. In the present case, according to the testimony of Mr. Arnow, supported by reference to Exhibit P-18, the following appears:

> . . . the lake would have been 3.7 feet higher at the time of statehood if it weren't for the activities of man in the basin. . . . [C]arrying it through 1967. . . . the difference

Postponing for consideration under Part VII, *infra*, the view of the Special Master that a reasonably permanent or stable result of the process is essential to a finding of reliction, and recognizing that under *Bonelli* reliction, as accretion, may at times occur perceptibly, it seems appropriate first to consider the claim of the United States that the recession of the Lake as of June 15, 1967, the date of the quitclaim deed, had occurred by the "little by little" or gradual and imperceptible process, and for that reason Utah had lost the area in question to the United States under the reliction doctrine.

VI. The Special Master is Unable to Find that the Exposure of the Bed of the Great Salt Lake June 15, 1967, the Date of the Quitclaim Deed, Had Come About by a Gradual and Imperceptible Process

The term "fluctuations" is used herein to mean, unless otherwise indicated, the reactions of the waters of the Lake, aside from responses to the wind, to changes in the elevation or level of the Lake. The United States points out that the Lake experiences three general types of fluctuations, annual, seasonal and daily. Upon this factual basis the United States centers its claim that reliction accounts for the exposure of the shorelands between statehood and June 15, 1967, since, it is said, only the annual fluctuation reflects a change in the ordinary high water mark, which, according to the United States, is that boundary subject to modification by reliction. Thus, we

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is . . . 5.28 feet higher in 1967 than it actually was, if it weren't for the activities of man.

(Tr. 44.) Except for these activities the bed of the Lake would not have been exposed as of June 15, 1967 to the extent this had occurred. The State of Utah, however, has not pressed before the Special Master reliance upon the effect due to the activities of man.

are urged to look only to annual "fluctuations" of the level of the Lake, for daily fluctuation allegedly is caused by the wind and is not a change in the level of the Lake, and seasonal fluctuation recurs each year in essentially the same pattern. Exhibit P-4. On the other hand, the annual change is a product of every physical factor affecting the level of the Lake, see pages 8-9, *supra*, and is measured, according to the United States, by differences in the "average yearly stage" of the Lake, which is the average of the levels of the Lake at regular intervals over a 12-month cycle. Exhibit D-6.

Therefore, the United States continues, the "average yearly stage" of the Lake is the proper standard for measuring the level of the Lake. This "average annual change" since statehood has generally been less than 1 foot per year. However, since some of the shorelands are extremely flat, the water moves almost in a horizontal direction and a small change in the level of the Lake can inundate or expose hundreds of feet of shoreland. Thus, the annual average change in level of only .69 feet (8.28 inches) would expose or inundate about 50,000 acres of shoreland. Exhibit P-5. The shoreline of the Lake is 350 lineal miles, with the result, it is said, that an average annual movement along the shore is less than 1200 feet, barely 3 feet per day or a little over 1½ inches per hour. The United States accordingly concludes that such a movement is not humanly perceptible as it occurs, adding, "[n]one of the changes in the level of the Great Salt Lake have been of so sudden or violent a character as to be perceptible while the process was going on." Exhibits P-18, D-4.[15]

It should be noted that in distributing the 50,000 acres of shoreland among the 350 lineal miles consideration was

[15] According to the United States the most extreme change in the boundary occurred between 1906 and 1907 and amounted to less than 15 inches per hour.

not given to the fact that the shorelands are not uniformly affected by change in the level of the Lake. The flat shorelands surrounding the Lake are interrupted at different points by small mountain ranges set back at varying distances from the shoreline. For example, on the north side of the Lake the Promontory Mountains form a headland of about 30 miles long which juts southward in toward the center of the Lake. See Exhibit P-1. In the southeastern sector of the Lake rise the Oquirrh Mountains and the Stansbury Mountains. Several mountain clusters also exist within a few miles of the western shore of the Lake. Among these are the Lakeside Mountains and Terrace Mountains. The eastern and northwest shorelands of the Lake, however, are almost entirely dominated by salt and mud flats. See Report of Special Master Ganey, October 26, 1970, at 10-13; Exhibit P-1. The various mountain ranges form an irregular barrier to a uniform spread of the water when the Lake is on the rise. Mr. Arnow refers to differences in consequence of a change of 5 feet in the Lake elevation. For instance, at those points on the west side where the flat shorelands dominate, water could rush inland for 7½ miles, whereas such a change would cause "very little change—no change" where the mountains are.[16] (Tr. at 34.)

The movements of the water during any year, and the resulting exposure or inundation of the shorelands, are not mirrored in the annual averages. Thus, an examina-

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[16] When the United States speaks of an average movement along the shore of a little more than 1½ inches per hour there is not reflected the fact that the Lake's movement along that part of its shoreline where mountains rise is less than where there are vast stretches of flat land where the water can rush overland almost unimpeded. Utah, however, does not discuss this inaccuracy, as it seems to the Special Master, in the United States' calculations.

tion of Exhibits P-9 and P-10 [17] discloses that the elevations of the Lake on June 1 and November 1, from 1850 to 1972 [18] generally ranged between one and two feet within a six-month span, exposing or inundating about 50,000 to 150,000 acres of the shallow mud flats. However, the yearly average of these movements is not their visual movements. Changes in elevation may be gradual and imperceptible but are only a part of a process the whole of which includes the effect upon the shorelands of such changes. If the effect on the shorelands is not imperceptible then the whole of the process is not imperceptible within the meaning of the doctrine of reliction.

The fluctuations at monthly intervals from 1896 to February 1, 1973, are shown on Exhibits P-11 and P-12. Changes in elevation are noted on the former. The latter translates those changes into acreage of shorelands affected. Study of these Exhibits together with Exhibits P-13 and P-14,[19] and using as illustrative the period from November 1, 1970 to June 15, 1971, shows that the rise in the level of the Lake flooded over 450,000 acres of the flat shorelands, followed by a recession for three and a half months, leaving inundated about 175,000 acres, rising again to inundate some 380,000 acres in the following seven and a half months. The Lake then receded for four and a half months, leaving inundated some 200,000 acres.

Exhibit P-16 charts the fluctuations for June, 1967. On June 6, for example, the level of the Lake rose and fell 10 times. When these actual fluctuations are averaged, however, the net change is zero. For ten days just

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[17] The data contained in the Exhibits are based on undisputed gauge recordings.

[18] Only to June 1, 1972

[19] Exhibits P-13 and P-14, however, are limited to monthly intervals from 1955 through February 1, 1973.

prior to June 15, 1967, the date of the quitclaim deed, the major fluctuations in elevation ranged between 3 and 6 inches, inundating or exposing between 10,000 and 20,000 acres with each fluctuation.[20]

If the actual change since statehood in the relation of the waters of the Lake to the adjoining land had been as calculated by the United States, only a little over 1½ inches per hour,[21] the position of the United States that the process has been imperceptible would be substantial, but this statement of the rate of change in the relation of the water level to acreage affected does not reflect the actual changes as they occurred. Changes in the level of the Lake are gradual. However, the imperceptibility feature of reliction is to be judged according to the actual effect on the shorelands of such a change. The unique nature of the area causes a gradual and slight change in the elevation of the Lake to result in a much greater alteration of the relation of the water to the land. This is demonstrated by the statistical data which has been charted from the records, partially analyzed above and more fully disclosed by the Exhibits which chart more fully the constant movements of the waters and the ef-

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[20] The above are a few of many detailed records which have been graphed and charted upon Exhibits placed in the record. Similar chartings of daily and hourly fluctuations in elevation and accompanying effect on acreage are available in the Exhibits, although only some of those specifically referred to are reproduced in this Report. The Special Master does not understand that either the United States or Utah challenges the accuracy of any of the Exhibits, but only their significance on the imperceptibility issue, or, stated otherwise, only their significance on the issue of reliction. There is appended to this Report as Appendix A, calculations of the movements of the Lake by periods which have been compiled by the Special Master from the Exhibits. These calculations were approved by the parties with slight modifications.

[21] *See* p. 15, *supra*.

fect of these on the land, annually, seasonally, monthly, daily and hourly.

To place the matter thus disclosed in a light most favorable to the United States is to consider what may be referred to as the net result of the movements of the Lake over a substantial period of time. For example, in the ten years from about 1953 to 1963 (see Exhibits P-12 and D-6), the general movement, due to lowering of the elevation of the Lake, was a recession of its waters from the shorelands, accompanied, however, by rather constant fluctuations up and down, as it were, as the general recession continued. At the end of the period there was a very perceptible area which had become exposed during the period, but perhaps there had been at no particular moment a separate perceptible component of this total movement of exposure. To accept this, however, as meeting the imperceptible element of reliction, would in the view of the Special Master be an adaptation of that element of the doctrine to the unique character of the Great Salt Lake rather than to apply the imperceptible element as it has developed in the law. While there are indeed features in the over-all process and its result, thus described, which arguably favor the Court's acceptance of the imperceptible element of the doctrine, nevertheless the continued rise and fall of the elevation of the Lake on an hourly, daily and weekly basis, is unprecedented in the historical development and previous application of this element of the doctrine. This of course is due to the unique character of the area, with the erratic movements of the Lake over the land, almost constantly responding in exaggerated reflexes to slight alterations in the level of its surface.[22] The unique situ-

[22] The effect of the wind should also be mentioned. Mr. Arnow testified: ". . . we have a pile-up of two feet of water in the first few hours of a storm. And if the wind will persist steadily for a period of days in the same direction, the

ation resists doctrinaire classification. The perceptible net or residual change after a passage of time in the relation of the water to the land, due either to recession or progression of the water, may often be obscured as it occurs by the constant fluctuations of the water. The Special Master, however, is unable to find that the recession of the Lake to its level of June 15, 1967, occurred in a gradual and imperceptible manner.

Moreover, and importantly, even were the recession to June 15, 1967, gradual and imperceptible, the relation of the water to the shorelands at that date was not of the reasonably permanent or stable character essential, in the view of the Special Master, to application of the doctrine of reliction, a matter to be more fully discussed.

VII. The Rationales of Reliction, In Large Measure Those of Accretion, Are Not Supported By the Facts of the Present Case

1. It seems desirable to round out the rationales of the doctrine, with special reference to the Court's treatment of accretion in *Bonelli*. The Court summarized the reasons underlying the common law doctrine as follows:

> First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded.[21] Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes* v. *Washington*, *supra*, at 293; *Yates* v. *Milwaukee*, 10 Wall. 497, 504 (1871). Riparianness also encompasses the vested right to

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water level is pushed up ½ a foot and will stay half a foot higher for several days." (Tr. 47.) Also, "the higher the wind the higher the evaporation," and "the higher the temperature the higher the evaporation."

future alluvion, which is an "essential attribute of the original property." *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. *Ibid.* The effect of the doctrine of accretion is to give the riparian owner a "'"fee, determinable upon the occupancy of his soil by the river," and [to afford] the State [a title] to the river bed [which is] likewise a . . . "qualified" fee, "determinable in favor of the riparians upon the abandonment of the bed by the river."'"[22]

[21] [Omitted.]

[22] 107 Ariz., at 472, 489 P.2d, at 706 (Lockwood, J., dissenting), quoting, *State* v. *R.E. Janes Gravel Co.*, 175 S.W.2d 739, 741 (Tex.Civ.App. 1943), rev'd on other grounds *sub nom. Maufrais* v. *State*, 142 Tex. 559, 180 S.W.2d 144 (1944).

414 U.S. at 326.

Reverting to the factual situation in *Bonelli*, the Court pointed out in addition that the riparian owner, "because of the navigational servitude" is at the mercy of "governmental forces which may similarly affect the riparian quality of his estate":

> Accordingly, where land cast up in the Federal Government's exercise of the servitude is not related to furthering the navigational or related public interests, the accretion doctrine should provide a disposition of the land as between the riparian owner and the State. See *Michaelson* v. *Silver Beach Assn.*, 342 Mass. 251, 173 N.E.2d 273 (1961).

414 U.S. at 329.

The navigational and related public interests of a State have required that a State retain title to and con-

trol of navigable waterways as an element of its sovereignty. This has proved historically necessary because,

> " 'Such waters . . . are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing. . . .' *Shively* v. *Bowlby*, *supra*, at 11."

414 U.S. at 322.

However, once the rechannelization project was accomplished the land exposed as a consequence, formerly part of the riverbed, was "no longer . . . incapable of ordinary and private occupation . . ." and there was, as well, "no longer a public benefit to be protected; consequently, the State, as sovereign, had no need for title." 414 U.S. at 323-24. Thus, *Bonelli* supplements the traditional doctrine of accretion by requiring an appraisal of the state interests affected by the exposure, compared with the interests of the riparian owner.

2. The foregoing considerations underlying the doctrine of accretion, and, insofar as the facts of the present case permit, the doctrine of reliction, subsume, in the view of the Special Master, a reasonable permanence or stability in the change which has occurred in the relation of the water to the land. The United States in its brief before the Special Master urges that a more precise statement would be that the land formation must be "not clearly temporary." The situation in *Bonelli* created by the channeling project was "not clearly temporary." Indeed it was of a permanent character.

The generally uniform characterization of the common law doctrine of reliction and accretion has always seemed to contemplate a result substantially permanent; thus, the land "hath been formed, and hath been settled, grown and accrued," the language of *The King* v. *Lord Yarborough*, *supra*. The omission of the case law to refer

uniformly to permanence is understandably due to this quality being implied as a result of the gradual and imperceptible process. The situation should be no different where the claim rests upon a process which may have been perceptible. Both accretion and reliction involve an addition to the riparian land, ordinarily by a deposit of soil in the case of accretion, by the exposure of land previously under water in the case of reliction. The factor of "addition" implies reasonable stability or permanence. The criterion of "little by little, by small and imperceptible degrees," *Jones* v. *Johnston, supra*, 59 U.S. at 156, had reference to "land gained from the sea," which implicitly assumes something more than a temporary condition of the "soil that had gradually been deposited." In *Sapp* v. *Frazier*, 51 La.Ann. 1718, 26 So. 378 (1899), it was said that ". . . 'reliction' is land added to a front tract by the permanent uncovering of the waters," and ". . . as used by the English law, [it] meant when the sea shrank back below the usual watermark, and remained there." 26 So. at 380. *State* v. *Longyear Holding Co.*, 224 Minn. 451, 29 N.W.2d 657 (1947) is to the same effect:

> It is also clear that before a riparian owner can claim title to lands as a result of relictions, *such reliction must be of a permanent nature*, without the possibility of the water again filling in or covering the relicted area. (Emphasis in original.)

29 N.W.2d at 667.

> Derelicted or relicted land is land added by the recession of the water leaving a portion of the bed dry.[39]
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> [39] *Fontenelle* v. *Omaha Tribe of Nebraska*, 298 F.Supp. 855 (D.Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970).

Lundquist, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 ARIZ.L.REV. 316, 321 (1972). And see, *Utah* v. *Hardy, supra.*

Though the use of "permanent" as a necessary quality of the change appears sometimes in opinions where the

doctrine is not applied because the change has been so clearly temporary, as in *Flisrand* v. *Madson*, 35 S.D. 457, 152 N.W. 796, 798 (1915), and *Hillebrand* v. *Knapp*, 65 S.D. 414, 274 N.W. 821, 823 (1937), none of the decisions which omit such reference is inconsistent with the idea of permanence or stability. There is nothing in the Court's application of federal common law to the situation in *Bonelli* which indicates any departure from the non-federal common law in this respect. All references to the change in relation of the Colorado River to the shoreland indicate the result was a permanent addition to the riparian land.

3. The special facts of the present case bearing upon the question of permanence are now considered.

At the date of the quitclaim deed the elevation of the Lake was 4194.9 feet (Tr. 3), a drop of 5.3 feet in its level from January 4, 1896, the date of statehood. At that time its elevation was 4200.2 feet. See Report of Special Master Ganey, October 26, 1970, at 29. This lowering of the level of the Lake had exposed by June 15, 1967, an area of about 325,000 acres, shown on Exhibit D-2 in the dark shading. Since June 15, 1967, the level of the Lake has risen to within a few inches of its statehood level, reinundating this area which had become exposed after statehood. Thus as of February 27, 1973, the date of hearing before the Special Master, nearly all the land now in dispute had been resubmerged. See p. 9, *supra*.

This development is part of the physical situation respecting the Lake and adjoining land, demonstrated by data available to the Court and bearing upon the question to be decided. Whatever interests the United States owned June 15, 1967, and described in the deed, passed to Utah; but whether any of this land which had become exposed after statehood was then owned by the United States depends upon whether the doctrine of reliction

had divested Utah of its prior ownership. That question, in the opinion of the Special Master, cannot be answered so as to divest Utah of title to the area in question unless the condition on June 15, 1967 was a reasonably permanent or stable one. This element of the doctrine is illuminated by the continuity of the Lake's history since June 15, 1967.

The importance of the post-June 15, 1967 data is that it demonstrates that the situation had not prior to or on June 15, 1967, reached a state of stability or reasonable permanence. While the Court's decree of May 22, 1972, states the basic question to be whether "prior to June 15, 1967, the claimed doctrine of reliction applies," the facts bearing upon whether the doctrine applies prior to that date include data with respect to the relation of the waters of the Lake to the land on and subsequent to June 15, 1967. This evidence discloses a continuing movement which has reinundated the area, thus reconstituting the bed of the Lake just about as it was at statehood.

It does not seem that the issue of possibly divesting Utah of title to the area should be determined by freezing the situation as it was at some moment on or prior to June 15, 1967, when it has developed that the Lake on that date was in a rising movement which, with interim up and down fluctuations, has continued to the time of the making of the record in this case. See Exhibit P-4.

The doctrines of accretion and reliction contemplate ambulation in title boundaries; but the valuable features of riparian ownership, particularly those incident to maintaining access to the water, and the compensation theory referred to in *Bonelli*, *supra*, 414 U.S. at 326, seem to the Special Master to envisage a situation different from the special relation of the waters of the Great Salt Lake to the riparian land. Such a relation seems inconsistent with the stability which should pertain to a change

in title by operation of law. In providing for payment by Utah to the United States of such interests as the United States might be found to have conveyed to the State by the quitclaim deed of June 15, 1967, the statute of June 3, 1966 is indicative of a congressional assumption that such payment would be required only if the situation at that date was reasonably permanent in nature rather than temporary, as the history of the Lake has demonstrated it to have been.[23]

4. Under a dominant principle of *Bonelli* the reinundation during the period of this litigation of almost the entire statehood bed of the Great Salt Lake confirms the Special Master in his recommendation adverse to application of the relicition doctrine, because the public benefit of Utah entitled to protection has moved along with the reinundating waters of the Lake, whereas in the *Bonelli* case Arizona's public benefit to be protected faded away as the waters of the Colorado River receded from the land.

Note is taken of the *Statement of the State of Utah With Respect to Bonelli v. Arizona*, filed January 28, 1974, which refers to various interests of Utah in the disputed area as substantial. Among these is that the exercise of its navigational servitude over the Lake would be threatened by a holding that the disputed land is not part of the bed of the Lake. Reference also is made to the brines, salts and minerals in solution. These minerals are extracted by pumping water from the Lake into "settling ponds" on the salt or mud flats, where solar evaporation causes the minerals to precipitate on the bottom of the ponds. See Tr. at 33, 81.

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[23] Should the Court hold that the doctrine of reliction has divested Utah of title to the land claimed by the United States under that doctrine, a question, not factually addressed by the parties on the present record, may arise as to the exact boundary lakeward of the relicted lands on June 15, 1967.

The doctrine of reliction does not seem to furnish a sound basis for resolution as of June 15, 1967, of the respective interests of the two sovereigns in and about this unusual body of water.

FINDINGS OF FACT [24]

1. The Great Salt Lake is a large body of water surrounded in greater part by shorelands which are so flat that a slight change in the elevation of the Lake causes the water, except where the shore is mountainous, to spread over a large area quite out of proportion to the change in elevation of the surface of the Lake if the change is a rise, and vice versa if a fall.

2. Only a relatively small part of the immediate shoreland is mountainous. See Exhibit P-1; Report of Special Master Ganey, October 26, 1970, at 10-13.

3. Streams of clear water are the chief tributary sources of the Lake, supplemented by precipitation. The Lake has no outlet. Its elevation accordingly is governed by the inflow of the streams, by precipitation, and by evaporation, the latter depending upon climate, the area

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[24] The parties are in agreement as to the physical characteristics and history of the movements of the Lake in relation to the shorelands, represented by the statistical data and charts contained in the Exhibits. This data as set forth in the Report and, also, the testimony of Mr. Arnow and Mr. Hewitt, may therefore be considered as undisputed findings. The present Findings of Fact are limited to those basic or ultimate findings which the Special Master believes are determinative of the conclusion to be reached. They reflect in final form the interim findings and conclusions set forth in the course of his Report.

The fact that the Report in important respects is discursive of the evidence in its legal consequences, and is not confined to factual findings, the Special Master considered justified by the nature of the case.

of the surface of the Lake at different times, and the degree of salinity of the waters of the Lake.

4. As the name of the Lake implies the water is salty. The degree of salinity, which in turn affects the rate of evaporation, depends in part upon the relation of fresh water inflow and precipitation to the degree of evaporation. The latter depends largely upon the relative aridity of the climate at any particular time.

5. Man-made interferences with the rate of tributary inflow over the years has affected the elevation of the Lake. The elevation would have been 3.7 feet higher at the time of statehood and 5.28 feet higher in 1967 if it were not for the activities of man.

6. The various factors above described and their interaction one upon another cause a continuous change in the elevation of the Lake. This causes a constant fluctuation of its waters, in both a receding and inundating character with respect to the flat shorelands.

7. At some periods in the history of the Lake, of which accurate records have been kept, made available to the Court in the record compiled before the Special Master, the general trend in the relation of the waters of the Lake to the shorelands has been a recession from the line which defined the bed of the Lake at statehood, when title to the bed vested in Utah. These periods of general recession, exposing land which was part of the bed at statehood, have always been accompanied by "up and down" fluctuations which did not interrupt the general recession.

8. At other periods in the history of the Lake the opposite of the above has occurred; that is, the general direction of the movement of the waters has been to inundate or reinundate large areas of shoreland previously exposed, accompanied by similar smaller fluctuations "up and down" within the general direction of inundation or reinundation.

9. The situation described in findings 7 and 8 is illustrated by Exhibit P-4 made a part of this Report, and grows out of the variations which occur among the several factors which contribute to the movements of the waters in relation to the shorelands at different times.

10. On January 4, 1896, the date of statehood of Utah, the elevation of the Lake was 4200.2 feet. On June 15, 1967, the date of the quitclaim deed, it was 4194.9 feet, a recession of 5.3 feet. This had resulted as of June 15, 1967, in the exposure of an estimated 325,000 acres of land which was part of the bed of the Lake at statehood.

11. On June 15, 1967, as part of a process of movement of the waters of the Lake in relation to the shorelands which began in 1963, the elevation of the Lake was rising and has continued in a general rising movement to the time of the hearing before the Special Master in February, 1973, at which time nearly all the land exposed as described in Finding 10 had been reinundated so that the bed of the Lake was about as at statehood; that is, the land which at statehood had constituted the bed of the Lake was again almost entirely covered by the waters of the Lake.

12. The Lake experiences three general types of fluctuations, annual, seasonal and daily, although there are also measurable monthly and hourly changes. The annual change is the product of every physical factor affecting the level of the Lake on a yearly basis. The average of changes in the level of the Lake at regular intervals over a 12-month cycle since statehood has been about .69 feet; that is, the average annual change of the level has been about 8.28 inches, a change which, considered alone, would inundate about 50,000 acres of shoreland due to the fact that much of the shoreland is so flat that the water moves almost in a horizontal direction.

13. The shoreline of the Lake is 350 lineal miles. If the shoreline were of about equal flatness and the 50,000 acres referred to in Finding 12 were distributed equally among the lineal miles, the average movement along the shore would be about 1200 feet annually, about 3 feet per day, or a little over 1½ inches per hour. These calculations do not reflect the actual movements of the water as they occur but are based on averages calculated subsequent to the actual movements.

14. The shorelands are not of equal flatness or width of flatness, due to the mountains which are adjacent to some parts of the Lake, shown on Exhibit P-1, and other mountains which border the Lake. The movement of the waters along the lineal miles of shoreland is affected by mountains some of which, although not at the edge of the water or obtruding upward in it, border the shorelines at a distance near enough to affect the spread of the waters in a manner not reflected in the calculation described in Finding 13.

15. By reason of the conditions described in Finding 14 above the calculations reflected in Finding 13 that the average movement along the shore would be about 1200 feet annually, about three feet per day, or little more than 1½ inches per hour, are to an unascertained degree an under-estimate of the rate of movement over extensive areas of shore, a rate of movement which the Special Master cannot find on this record to be imperceptible.

16. The continuous rise and fall of the elevation of the Lake, though gradual, is reflected in a continuous movement of the waters to and fro across the shorelands, apart from the effects of the wind. These movements are often perceptible.

17. The net amount of land exposed or inundated over a substantial period of time is perceptible in comparison with the situation at the beginning of such pe-

riod, although one may not be able at any particular moment to perceive a separate component of the resulting exposure or inundation.

18. The constant fluctuations [25] of the Lake may often obscure the progress, as it occurs, of a recession or inundation which is readily perceived after the passage of time, but the Special Master is unable to find that the progress of such recession or inundation is at a rate which would be imperceptible as it occurs.

19. The land referred to as exposed at the time of the quitclaim deed, which at statehood was part of the bed of the Lake, was not an addition of a reasonably permanent or stable character to the uplands, title to which is in the United States. The land in question has been almost entirely reinundated by a spreading of the waters of the Lake by a movement which began in 1963, was in progress at the date of the quitclaim deed, and continued to the time of the hearing in this case before the Special Master in February, 1973.

Conclusions of Law

1. The question considered is to be decided under the federal common law doctrine of reliction.

2. Whether under that doctrine any interests were owned by the United States in the lands lying between the outer edge of the bed of the Lake at statehood and its bed underwater on June 15, 1967, which passed to the State of Utah by the quitclaim deed of the United States of June 15, 1967, depends upon whether the exposure of the land referred to, either by a perceptible or a gradual and imperceptible process, constituted a reasonably permanent or stable addition to the riparian land which was up-

[25] The use of "fluctuations" in this finding does not exclude the effect of the wind.

land from the bed of the Lake at statehood, title to which was in the United States.

3. The exposure of the lands referred to occurred in the course of such unique changes in the relation of the waters of the Lake to the shorelands as not to come within the doctrine of reliction. These changes were not at the date of the quitclaim deed of such a reasonably permanent or stable character as to warrant application of the doctrine.

4. The public benefit of Utah which is entitled to protection has accompanied the reinundation of the bed of the Lake to approximately its extent at statehood.

5. The law of reliction has not divested the State of Utah of title to the lands described.

6. The State of Utah is entitled to a decree quieting its title as against the United States to the bed of Great Salt Lake at the date of statehood.

7. The State of Utah is not required to pay the United States for the land covered by Great Salt Lake and below the boundary line of the Lake's bed as of January 4, 1896.

8. The United States is the riparian owner which would be entitled to the benefit of the doctrine of reliction were it applicable to the land the title to which is the subject matter of this Report. The Lake, its bed, and the adjoining land were ceded by Mexico to the United States in 1848 under the Treaty of Guadaloupe Hidalgo, 9 Stat. 922. See Report of Judge Ganey, October 26, 1970, p. 9.

PROPOSED DECREE

It is ordered, adjudged and decreed that:

1. The United States of America, its departments and agencies, are enjoined, subject to any regulations which the Congress may impose in the interest of navigation

or pollution control, from asserting against the State of Utah any claim of right, title and interest:

(a) to any of the exposed shorelands situated between the edge of the waters of the Great Salt Lake on June 15, 1967, and the bed of the Lake on January 4, 1896, when Utah became a State, with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project;

(b) to the natural resources and living organisms in or beneath any of the exposed shorelands of the Great Salt Lake delineated in (a) above; and

(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the exposed shorelands, including any minerals, delineated in paragraph 1 above of this decree.

3. There remains the question whether any lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with section 1 of the Act of June 3, 1966, 80 Stat. 192), and conveyed by quitclaim deed to the State of Utah, included any federally owned uplands above the bed of the Lake on the date of statehood (January 4, 1896) which the United States still owned prior to the conveyance to Utah.[1] In the absence of agreement between the parties disposing of the above question or of the necessity for further proceedings with respect thereto, the Special Master is directed to hold such hearings, take such evidence, and

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[1] As appears from p. 4 of the Special Master's Report the parties have reserved their position with respect to this question.

conduct such proceedings with respect to that question as he deems appropriate and, in due course, to report his recommendations to the Court.

4. The prayer of the United States of America in its answer to the State of Utah's Complaint that this Court "confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended," is denied.

Respectfully submitted,

CHARLES FAHY,
Senior Circuit Judge,
Special Master.

APPENDIX A

Statistical Data as to Rise and Fall of Elevation of Lake by Periods, with Effect on Bordering Land.

1. 1873-1906

At the time of Utah's statehood, the Lake was in a period of general decline which had begun in 1873. In 1873 the Lake's average level was 4211.20 feet and in 1896 it had fallen to an average level of 4201.10 feet. It continued to fall until in 1906 it reached an elevation of an annual average of 4196.83 feet. Thus from 1873 to 1906, the Lake's elevation declined approximately 14.37 feet, and from 1896 to 1906, 4.27 feet. [Exhibits D-3 and D-6.]

The surface area of the Lake receded from an approximate average annual area of 1,554,000 acres in 1873 to approximately 1,120,000 in 1896 and 835,700 acres in 1906, with a recession between 1873 and 1906 of 718,300 acres of land and from 1896 to 1906 of 284,300 acres of land. [Exhibits D-3 and P-5.]

2. 1906-1910

From 1906 to 1910 the Lake rose 6.10 feet, from its average annual elevation of 4196.83 feet to 4202.93 feet, and increased its surface area by approximately 371,800 acres, from 835,700 acres to 1,207,500 acres. [Exhibits D-3 and P-5.]

3. 1910-1920

From 1910 to 1920 the Lake declined 1.71 feet in elevation, from an average elevation of 4202.93 feet to 4201.22 feet, and receding 81,700 acres, from a surface area of 1,207,500 acres to 1,125,800 acres. [Exhibits D-3 and P-5.]

4. 1920-1924

From 1920 to 1924 the Lake rose 3.09 feet in elevation from an average of 4201.22 feet to 4204.31 feet, and its surface area increased by 143,700 acres from 1,125,800 acres to 1,269,500 acres. [Exhibits D-3 and P-5.]

5. 1924-1936

From 1924 to 1936 the Lake declined 9.54 feet in elevation from an average of 4204.31 feet to 4194.77 feet, and its surface area decreased 566,700 acres, from 1,269,500 acres to 702,800 acres. [Exhibits D-3 and P-5.]

6. 1936-1953

From 1936 to 1953 the Lake rose 5.17 feet in elevation, from an average of 4194.77 feet to 4199.94 feet, and its surface area increased 355,600 acres from 702,800 acres to 1,058,400 acres. [Exhibits D-3 and P-5.]

7. 1953-1963

From 1953 to 1963 the Lake declined 7.2 feet in elevation from an average of 4199.94 feet to 4192.22 feet, and its surface area decreased 438,800 acres from 1,058,400 acres to 619,600 acres. [Exhibits D-3 and P-5.]

8. 1963-1973 Hearing

From 1963 to the 1973 Hearing the Lake has been generally rising. In 1963 the elevation of the Lake was 4192.22 feet, the average level. In 1967, the average elevation of the Lake was 4194.01 feet, an increase of 1.79 feet. By 1967 the Lake's surface area had increased 52,800 acres from an average of 619,600 acres to 672,400 acres. If the Lake has reached 4200 feet, it would have risen 7.78 feet since 1963 and its surface area would have increased 442,400 acres to 1,062,000 acres. [Exhibits D-3 and P-5.]

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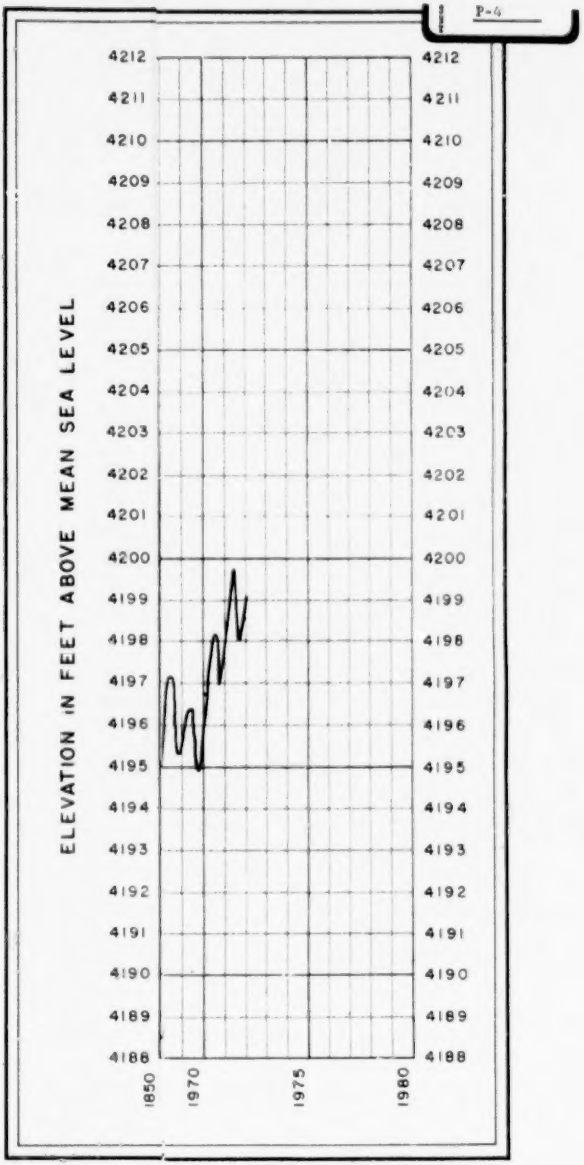

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

EXCEPTIONS OF THE UNITED STATES TO THE REPORT OF THE SPECIAL MASTER FILED APRIL 15, 1974

Pursuant to the order of the Court,[1] the United States presents the following exceptions to the Report of the Special Master filed April 15, 1974:

I

With respect to the Conclusions of Law of the Special Master appearing at pages 31–32 of his Report:

1. The United States excepts to the failure of the Special Master to conclude, in accordance with the

[1] On April 15, 1974, the Court ordered: "The Report of the Special Master is received and ordered filed. Exceptions, if any, with supporting briefs, may be filed [within 30 days]." A request by the United States for an extension of the time for filing the exceptions and brief to May 30, 1974, was granted on May 16, 1974. The Report of the Special Master is referred to herein as "R."

long-established rule of this Court, that seasonal changes in a body of water do not result in a change of the boundary that is subject to modification by the doctrine of reliction.

2. The United States excepts to the declaration in Conclusion of Law 2 that the application of the doctrine of reliction in this case "depends upon whether the exposure of the land * * * constituted a reasonably permanent or stable addition to the riparian land which was upland from the bed of the Lake at statehood * * *" (R. 31–32).

3. The United States excepts to the ruling in Conclusion of Law 3 that the exposure of shorelands "occurred in the course of such unique changes in the relation of the waters of the Lake to the shorelands as not to come within the doctrine of reliction" (R. 32).

4. The United States excepts to the ruling in Conclusion of Law 3 that the "changes were not at the date of the quitclaim deed of such a reasonably permanent or stable character as to warrant application of the doctrine" (R. 32).

5. The United States excepts to the determination in Conclusion of Law 4 that the "public benefit of Utah which is entitled to protection has accompanied the reinundation of the bed of the Lake to approximately its extent at statehood" (R. 32), inasmuch as the Special Master is in fact applying the doctrine of reliction to the benefit of the State of Utah while refusing to apply it to the benefit of the United States, and, further, because the reinundation referred

to for the most part has occurred since June 15, 1967, the public benefit for navigation or any other related purpose is already fixed in the State by the Great Salt Lake Lands Act of June 3, 1966, 80 Stat. 192.

6. The United States excepts to the holding in Conclusion of Law 5 that the "law of reliction has not divested the State of Utah of title to the lands described" (R. 32).

7. The United States excepts to the ruling in Conclusion of Law 6 that the "State of Utah is entitled to a decree quieting its title as against the United States to the bed of Great Salt Lake at the date of statehood" (R. 32).

8. The United States excepts to the ruling in Conclusion of Law 7 that the "State of Utah is not required to pay the United States for the land covered by Great Salt Lake and below the boundary line of the Lake's bed as of January 4, 1896" (R. 32).

II

With respect to the Findings of Fact of the Special Master appearing at pages 27–31 of his Report:

1. The United States excepts to the determination in Finding of Fact 10 that the recession of the Lake between statehood and the date of the quitclaim deed has resulted "in the exposure of an estimated 325,000 acres" (R. 29), inasmuch as the correct figure is 396,000 acres as shown in Exhibit P–5 (reproduced as a part of the Report).

2. The United States excepts to the determination in Finding of Fact 12 that a change in the level of the

Lake of 8.28 inches "would inundate about 50,000 acres of shoreland" (R. 29), inasmuch as the inundation of about 50,000 acres would occur *only* when a change took place at the level of about 4198.5 feet above mean sea level (the average level of the Lake since statehood), whereas generally a lesser number of acres is inundated by changes of 8.28 inches at both lower or higher elevations as shown in Exhibit P–5 (reproduced as a part of the Report).

3. The United States excepts to the characterization in Finding of Fact 14 that the effect of mountains upon the movement of the water along the shoreland is "not reflected in the calculation described in Finding 13" (R. 30), inasmuch as the calculation is an average which inherently includes areas where the rate of movement is both greater and smaller than the stated average.

4. The United States excepts to the characterization in Finding of Fact 15 that the average movement along the shoreland of 1½ inches per hour is "to an unascertained degree an under-estimate of the rate of movement over extensive areas of shore" (R. 30). The movement over the flattest part of the shore during the most extreme year amounted to only 15 inches per hour (Br. for the United States Before the Special Master, p. 7, n. 7). This is the greatest possible extent to which the calculated average in Finding 13 is an "underestimate."

5. The United States excepts to the determination in Finding of Fact 15 that the average movement of 1½ inches per hour, or the maximum historical movement of 15 inches per hour, is a rate of movement which is not imperceptible.

6. The United States excepts to the determination in Finding of Fact 18 that the progress "of a recession or inundation," unobscured by "constant fluctuations," cannot be found to "be imperceptible as it occurs" (R. 31).

7. The United States excepts to the determination in Finding of Fact 19 that the land exposed between statehood and the time of the quitclaim deed "was not an addition of a reasonably permanent or stable character" (R. 31).

III

With respect to the Proposed Decree of the Special Master appearing at pages 32–34 of his Report:

1. The United States excepts to the failure of the Special Master to include in the preamble of paragraph 1 the words "such as" in the phrase "subject to any regulations which the Congress may impose in the interest of navigation or pollution control" (R. 32–33), inasmuch as the Decree entered by this Court on May 22, 1972, 406 U.S. 484, uses the phrase "subject to any regulations which the Congress may impose, *such as* in the interest of navigation or pollution control [emphasis added]."

2. The United States excepts to the Proposed Decree of the Special Master in its entirety (R. 32–34), insofar as it grants the relief sought by Utah and denies the relief sought by the United States.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED APRIL 15, 1974

I. INTRODUCTION

This litigation is authorized by the Great Salt Lake Lands Act, 80 Stat. 192. In order to assure a permanent boundary between state and federal ownership of land in the Great Salt Lake Basin, Congress provided that the surveyed meanderline of the Great Salt Lake should become the boundary between state and federal ownership. To that end, the United States would quitclaim to Utah all of its interests below the meanderline,[1] and Utah, in partial compensation, would quitclaim to the United States all of its interests above the meanderline. These mutual obligations exist without regard to whether land on either side of the meanderline was exposed or inundated by the water (80 Stat. 192, Secs. 2 & 4). Utah agreed to pay

[1] The meanderline was surveyed at several different dates, but in many places approximates the level of the Lake in 1855.

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an assessed valuation for whatever land this Court determines that the United States owned below the meanderline as of the date of the quitclaim deed, June 15, 1967. Should Utah fail to do so within two years of the valuation, the mutual conveyances are cancelled, and each party would own those lands to which it was entitled in the absence of the Act.

In an earlier stage of this litigation, this Court held that the Great Salt Lake was navigable at the time of Utah's admission to the Union, and that the State therefore acquired title to the bed of the Lake by operation of the equal footing principle. 403 U.S. 9. Thus, the State of Utah is not obliged to pay the United States for any of the lands lying below the level of the Lake on June 15, 1967. 406 U.S. 484.

The question to be determined at this stage of the litigation is whether the lands exposed by the recession of the waters of the Great Salt Lake between statehood (January 4, 1896) and the date of the quitclaim deed from the United States (June 15, 1967) belonged to the United States, where it is the upland owner, by operation of the doctrine of reliction. If so, Utah is obliged to pay the United States for the lands so conveyed on June 15, 1967.[2]

[2] Should this Court agree with the Special Master that the doctrine of reliction is not applicable to Great Salt Lake and that Utah therefore has continued, notwithstanding any recession of the waters of the Lake, to own all lands within the boundary of the Lake at the time of statehood, it will then become necessary to resolve the dispute among the parties concerning the boundary of the Lake at statehood. The State contends that the surveyed meanderline represents the correct boundary of the Lake, and that therefore the quitclaim deed executed by the United States on June 15, 1967, did not enhance the State's title; in that case, the State would owe no payment to the United States under the Act.

II. QUESTIONS PRESENTED

1. Whether the fact that rapid daily and seasonal changes occur along the shorelands of the Great Salt Lake and the fact that exposed shorelands may someday be reinundated render the doctrine of reliction inapplicable to the Great Salt Lake.

2. Whether, between statehood and the date of the quitclaim deed, portions of the bed of the Great Salt Lake were exposed by a gradual and imperceptible process.

III. STATEMENT

In this stage of the litigation, there is little factual dispute concerning the history and characteristics of the Great Salt Lake.[3]

The Great Salt Lake occupies the lowest part of a flat, closed basin. The Lake is approximately 70 miles long and 30 miles wide. Its maximum depth is about

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On the other hand, the United States contends that the boundary of the Lake on January 4, 1896, is defined by the water's edge at that date (or some seasonally adjusted line derived therefrom), so that it remained the owner of the substantial areas lying between the water's edge at statehood and the surveyed meanderline, much of the Lake having been surveyed (and the meanderline established) at times when the elevation of the Lake was substantially higher than at statehood.

If, on the other hand, the Court agrees with us that the doctrine of reliction applies, only the technical matter of determining the boundary of the Lake on the date of the quitclaim deed will remain, and issues relating to the meanderline will drop out of the case and will not require further litigation.

[3] See R. 27, n. 24. The principal witness at trial was a joint witness, Mr. Theodore Arnow, United States Geological Survey (U.S.G.S.), Utah. Mr. Arnow's testimony (Tr. 28-61) consisted mainly of a brief explanation of the history of the Lake and the cause of its fluctuations. The detailed history of the fluctuations is set forth in plaintiff's Exhibits, which are derived from U.S.G.S. records.

34 feet. At some points, the shorelands surrounding the Great Salt Lake are extremely flat, while at others, mountain ranges project through the Lake. As a result, a change in the level of the Lake may inundate or expose considerable shorelands in some areas and no shorelands at all in others (Tr. 33–34).

The Great Salt Lake has no outlet. The only way the Lake loses water (outflow) is by evaporation. It receives water (inflow) from tributaries and from rainfall on the Lake. Since outflow rarely exactly equals inflow, the level of the Great Salt Lake fluctuates (Tr. 36–38; Ex. P–4).

Many variable but interrelated physical factors affect the level of the Great Salt Lake. The rate of inflow is for the most part a function of precipitation (Tr. 40). The rate of evaporation is a function of the wind, temperature, salinity, and surface area of the Lake. In addition, inflow affects salinity and surface area: As the level of the Lake rises, the rate of evaporation increases because there is more surface from which to evaporate, and conversely. Heavy inflow decreases the salinity of the water, which also increases evaporation. Thus, the level of the Lake tends to be self-stabilizing (Tr. 48–54).

The level of the Great Salt Lake is affected by three general types of fluctuations: annual, seasonal, and daily. Only the annual fluctuations reflect a change in the ordinary high water mark—the boundary that is subject to modification by the doctrine of reliction.

Daily fluctuation is caused by the action of the wind and is not a change in the level of the Lake. The wind can push up as much as two feet of water in one

part of the Lake while the level goes down commensurately elsewhere (Tr. 46–47).

The seasonal fluctuation reoccurs each year in essentially the same pattern and is the dominant element in changes in lake elevation (Cf. Exs. P–4, P–9, P–11). It is caused principally by regular changes in temperature and precipitation. Over the hot, dry summer the level of the Lake declines. As the temperature cools, the seasonal low occurs, usually in October or November. Maximum precipitation occurs in late fall and early spring, and the level of the Lake rises. As the temperature increases in the late spring, snowmelt runoff occurs. The seasonal high usually occurs in May or June, depending upon the coolness of the spring, again followed by a decline over the hot, dry summer (Tr. 48–49). These cyclical seasonal fluctuations are not in themselves changes in the boundary of the Lake.[4]

The annual change is a product of every physical factor affecting the level of the Great Salt Lake. It is measured by differences in the "average yearly stage" of the Lake, which is the average of the levels of the Lake at regular intervals over a 12-month cycle (Ex. P–18, p. 4). This is comparable to the 18.6 year cycle used in computing tidal boundaries. See *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26–27.

Annual changes in the level of the Great Salt Lake have generally been less than 1 foot per year. Since statehood, the average annual change has been about 8 inches (Ex. D–3). The greatest annual change occurred in 1907, when the level of the Lake rose 1.86 feet, or less than 1/16 inch per day. Since that time

[4] See discussion at pp. 15–17, *infra*.

the Lake has experienced an annual change of more than a foot on only ten occasions (Ex. D–3; Ex. P–18).[5]

Even though the annual fluctuations have not been great, small changes in the level of the Lake can inundate or expose hundreds of feet of shoreland (Ex. D–4) because the shorelands in some parts of the Great Salt Lake are extremely flat (see Exs. D–1 and D–2). As the level of the Lake changes, the movement of the water's edge in these flat areas is almost in a horizontal direction.

The average annual movement of the boundary of the Great Salt Lake has been quite small. Since statehood, the average Lake level has been about 4198.5 feet [6] (Ex. P–18). At this level, the average annual change in water level of .69 feet (Ex. D–3) would expose or inundate about 50,000 acres of shorelands (Ex. P–5). However, in a lake with a shoreline of 350 miles (1973 World Almanac, p. 474) this means an average movement along the shore of less than 1,200 feet (1178.5).[7] Such a movement is barely 3 feet per day, or a little more than 1½ inches per hour.

Similar calculations can be made for extreme circumstances. For example, the flattest shorelands in the entire perimeter of the Lake are located in the northwest corner (Ex. D–1; see B–B′ in Ex. D–5). The greatest annual change occurred between 1906 and 1907 when the level of the Lake rose from 4196.83

[5] Ex. D–3 and Ex. P–18 contain data only through 1967, the year of the quitclaim deed.

[6] All levels given are distances above mean sea level.

[7] 50,000 acres = 78⅛ sq. mi. 78⅛ sq. mi. divided over a 350 mile shore is .2232 mi., which equals 1178.5 feet.

to 4198.69 feet above mean sea level (Ex. D–3). As shown by cross-section B–B′, about 2.2 miles of shoreland, or 11,616 feet, were inundated in that area in one year. This most extreme movement in the most extreme year represents a "horizontal" movement of about 31 feet per day or only 15 inches per hour (Ex. D–4). And even in the most extreme year, many other areas along the shore remained relatively unaffected. At the area shown by cross-section D–D′, only 0.2 miles, or 1,056 feet, were inundated over the same year. This represents less than 3 feet per day or 1½ inches per hour (Ex. D–4). Values for the most extreme movement in an average year (which the master found unascertained in Finding of Fact 14) and the average movement in the most extreme year can be similarly calculated. Both would lie between 1½ and 15 inches per hour.

Long-term trends in climate have resulted in general upward or downward trends in the level of the Lake (Tr. 53). The evidence shows that on the day of statehood the level of the Great Salt Lake was 4200.8 feet,[8] and was approaching the bottom of a long downward trend. The average yearly stage of the Lake bottomed in 1903 at 4197.00 feet, and in 1910 reached the top of an upward trend. For about the next 15 years, the level of the Lake remained stable, fluctuating above the statehood level at 4202–4203 feet. In 1924 a downward trend began, which bottomed in 1936 at 4194.77 feet. For the next ten

[8] The Master's finding that the level was 4200.2 feet is not supported by the evidence. See Exs. P–3, P–11.

years the level of the Lake again remained relatively stable at about 4194.5 to 4195.5 feet. In 1946 the level of the Lake began a rise which peaked in 1953 just below the statehood level, only to fall to the all-time low of 4192.22 feet in 1963. At the time of the trial the level of the Lake was rising and had almost reached statehood level (Ex. P–4; Ex. P–18; Ex. D–3; Ex. D–6). We are informed by the United States Geological Survey that the Lake is now above the statehood level. The May 24, 1974, level was 4201.4 feet.

Between statehood and the date of the quitclaim deed from the United States, the level of the Lake fell from 4200.8 feet (January 4, 1896) to 4194.9 feet (June 15, 1967). As a result, the water's edge moved inward and approximately 396,000 acres of shorelands were exposed around the Great Salt Lake (Ex. P–5).

ARGUMENT

The Special Master correctly concluded that federal rather than state law applies to determination of the boundary here in question (R. 5–7), relying on *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313. His Report in general correctly states the federal law of accretion, which essentially guarantees to the upland owner title to adjoining riparian land that is formed by "gradual and imperceptible" processes (R. 10–14). See *Bonelli, supra*, 414 U.S. at 325–326, citing *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 624.

We submit, however, that in applying this standard, the Special Master made two errors of law. He regarded perceptible changes caused by seasonal factors

as affecting the boundary of the Lake and, because they were perceptible, as negating the applicability of reliction (R. 17–20). And, secondly, he held that even if the movement were gradual and imperceptible, reliction would not apply if the land uncovered was not "reasonably permanent or stable" in the sense that it was subject to reinundation, years or decades later (R. 20, 23–24). As we show below, however, the principle of reliction requires only that a change be gradual and imperceptible as measured without regard to ephemeral or seasonal factors. We further show that the record establishes that the changes in the boundary of the Great Salt Lake have been gradual and imperceptible. Finally, we show that analysis of the public benefit of the parties here provides no reason to change the established rule.

I. PERCEPTIBLE AND EXTENSIVE TEMPORARY OR SEASONAL MOVEMENTS OF A PHYSICAL RIPARIAN BOUNDARY DO NOT AFFECT THE LEGAL BOUNDARY AND THUS DO NOT DEFEAT THE APPLICABILITY OF THE DOCTRINE OF RELICTION

The Special Master takes special note in his report of data showing extensive seasonal changes in the area of the Lake (R. 17, par. 1) and minor but continuous daily fluctuations (R. 17–18). He uses this to indicate that when the "actual effect on the shorelands of such a change" is perceptible, at any time, then the doctrine of reliction cannot apply. This is not the law.

The boundary does not fluctuate with seasonal or obviously temporary changes. As the Court observed in *Alabama* v. *Georgia,* 23 How. 505, 515:

> * * * the bed * * * is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, *without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.* [Emphasis added.]

See also *Sapp* v. *Frazier,* 51 La. Ann. 1718, 26 So. 378, 380; *Hillebrand* v. *Knapp,* 65 S.D. 414, 274 N.W. 821, 823; *Anderson* v. *Ray,* 37 S.D. 17, 156 N.W. 591, 593.

Similarly, the movement of the water's edge during the annual flood stage of the Colorado River may well have been perceptible, but that movement did not affect the location of the ordinary high water mark. See *United States* v. *Claridge,* 416 F. 2d 933 (C.A. 9); *Arizona* v. *Bonelli Cattle Co.,* 107 Ariz. 465, 489 P. 2d 699, reversed on other grounds, 414 U.S. 313. And this Court has held that continual fluctuations do not prevent the application of the doctrine of reliction to more permanent changes, stating in *Philadelphia Co.* v. *Stimson, supra,* 223 U.S. at 625–626:

> * * * the general principle of accretion * * * applies * * * notwithstanding the extent and rapidity of the changes *constantly* effected. *Jefferis* v. *East Omaha Land Co.,* [314 U.S. 178]; *Jones* v. *Soulard,* 24 How. 41; *Saulet* v. *Shepherd,* 4 Wall. 502; *County of St. Clair* v. *Lovingston, supra; St. Louis* v. *Rutz,* [138 U.S. 226.] * * * *Nebraska* v. *Iowa,* [143 U.S. 359] * * *." [Emphasis added.]

Contrary to this rule, the Special Master here erroneously concluded that because of the constant fluctuations of the level of the Great Salt Lake, the doctrine of reliction does not apply. The same argument was rejected in *Nebraska* v. *Iowa*, 143 U.S. 359, involving another famous body of water, the Missouri River, wherein the Court stated (*id.* at 367, 369–370):

> * * * It is contended, however, that the doctrine of accretion has no application to the Missouri River, on account of the *rapid and great changes constantly going on* in respect to its banks; but the contrary has already been decided by this court in *Jefferis* v. *Land Company*, 134 U.S. 178, 189. [Emphasis added.]
>
> * * * * *
>
> Our conclusions are that, notwithstanding the rapidity of the changes * * * the law of accretion controls * * *.

See also Beck, *The Wandering Missouri River: A Study in Accretion Law*, 43 N. Dak. L. Rev. 429 (1967).

II. LANDS THAT ARE SUBJECT TO REINUNDATION MAY NONETHELESS BE GAINED BY RELICTION

The Master's Report concludes that there must be a reasonable permanence or stability to the change in a physical riparian boundary in order for the doctrine of reliction to work a change in the legal boundary as well. As just noted, to the extent that this rule refers to seasonal or temporary changes, it is correct. Here, however, the Master has applied it to a situation where

an area may change from exposure to inundation only at intervals of many years or decades. For example, the land being reinundated by the present rise in the Lake has been dry for the last 22 to 43 years (see Ex. P–4). Similarly, many cases have held reliction applicable where a river first moved in one direction and then reversed its course to re-expose the land it had inundated. See, *e.g.*, *Peuker* v. *Canter*, 62 Kan. 363, 63 P. 617 (river moved and returned in 21 years); *Rupp* v. *Kirk*, 231 Iowa 1387, 4 N.W. 2d 264 (river moved in one direction for 25 years with occasional backtracking, then reversed); *Widdecombe* v. *Chiles*, 173 Mo. 195, 73 S.W. 444; *Wilcox* v. *Pinney*, 250 Iowa 1378, 1381, 98 N.W. 2d 720, 723. See also Beck, *supra*, p. 17, 43 N. Dak. L. Rev. at 453–461.[9] And, of course, land which is exposed or inundated just before a change in direction of movement takes place is generally the land that will be reinundated or re-exposed the most quickly. Thus land at the 4195 foot level exposed in 1960 was again inundated in 1966 (Ex. P–4).

In the present case, however, the long-run changes were of a reasonably permanent nature, and correlate well with long run factors such as rainfall.[10] For example, the Lake has reached the statehood level only once since that time, in 1909–1929. Conversely, at no

[9] Indeed, if a boundary did not remain ambulatory despite repeated water movement across a given point, the established doctrine that land lost by erosion or reliction may be regained by accretion or dereliction would be largely negated. See Lundquest, *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, 14 Ariz. L. Rev. 315, 325–326 (1972); 5A Thompson *on Real Property* (1957 Replacement) § 2652, p. 614.

[10] See Peck and Richardson, *Hydrology and Climatology of the Great Salt Lake*, in Guidebook to the Geology of Utah, No. 20, Figure 4.

other period has it fallen as low as it did in 1960–1967. In the context of the average yearly fluctuation in the lake level of well under 1 foot, the long run changes of as much as 15 feet clearly indicate the applicability of the doctrine of reliction, rather than the exception for temporary or seasonal changes discussed in point I, *supra*.

Furthermore, the cases cited by the Special Master are inapposite. *Sapp* v. *Frazier,* 51 La. Ann. 1718, 26 So. 378 (1899), is only an elaboration of the rule that a boundary does not follow seasonal changes. As the Lousiana court explained:

> But the mere temporary subsidence of the waters, occasioned by the seasons, coming in the winter and staying through the spring, going in the summer and gone through the autumn, does not constitute dereliction, in the sense of an addition to the contiguous lands, susceptible of private ownership as riparian rights. There is no "increase of the land" in such case. The reliction must be from the waters in their usual state. Where it periodically rises up over the land, and then recedes, there is no reliction. [26 So. 380.]

Thus, in the context of a seasonal change, the Louisiana court continued:

> There has been no permanent uncovering of the waters, no laying bare of the bottom by the retirement of the waters to stay, and no shrinking back of the waters below the usual water-mark, and the remaining of the same at the point of shrinkage. It is true its bed, or a large part of it, becomes measurably dry, and

> remains so, more or less, for four or five months in the year. But it becomes covered again with water, which remains over it six or seven months, and in turn runs off, leaving the bed exposed; and this successive recurrence of conditions has been going on without any change from time immemorial. [26 So. 381.]

Likewise, *State* v. *Longyear Holding Co.*, 224 Minn. 451, 29 N.W. 2d 657 (1947), does not support the Special Master's position. That case involved the temporary drainage of a lake to allow iron mining on the bottom, and the lake was to be refilled when the operation was completed—obviously a highly temporary change. And *Fontenelle* v. *Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb.), affirmed, 430 F. 2d 143 (C.A. 8), does not pertain at all to temporary fluctuations.

III. THE BOUNDARY OF THE GREAT SALT LAKE HAS MOVED BY A PROCESS OF RELICTION, SINCE ITS MOVEMENTS HAVE BEEN GRADUAL AND IMPERCEPTIBLE

We thus return to the question presented by the established federal common law of reliction: Has the boundary of the Great Salt Lake, defined by the "average yearly stage," moved by a gradual and imperceptible process? The answer, on this record, is "Yes." As shown *supra*, pp. 12–13, the most extreme annual movement of the boundary at the flattest (and thus most extreme) point on the shore was only 15 inches per hour. That rate of movement is gradual and imperceptible. It is equivalent to the movement of the minute hand on a clock with a 2½

inch radius (about the size of a home alarm clock). The perceptible movement of the second hand on a standard government wall clock is 80 times more rapid than the most extreme lake movement. And the lake movement is more than 30 percent slower than the speed of the slowest known snail (Guiness Book of World Records, 1974 ed., p. 101).

As noted, 15 inches per hour is the most rapid movement of any part of the boundary of the Great Salt Lake that has occurred in historical times. A better standard for judging the Lake's fluctuation is the average movement over a period of years, measured around the whole perimeter of the Lake. That movement is about 1½ inches per hour, far below the threshold of human perception. Should one choose to follow the Special Master's suggestion (R. 15–16; Findings of Fact 14–15) and consider the movement in an average year along areas of flat shorelands, that movement would be substantially less than 15 inches per hour. Since the average lake level change of .69 feet (Ex. D-3) is about 35 percent of the most extreme change in lake level, the rate of movement in an average year at the flattest point along the shore would be about 5 to 6 inches per hour. The Special Master therefore erred in declaring (R. 20, 30) that such a movement cannot be found to be imperceptible.

Moreover, the law requires a specific finding that the movement was perceptible in order for reliction not to apply. A common law presumption favoring an ambulatory boundary is expressed in the rule that if an avulsion is not shown, an accretion will be pre-

sumed. Lundquist, *supra*, 14 Ariz. L. Rev. at 325 n. 54; 65 C.J.S. *Navigable Waters* § 86c; 5A Thompson, *supra*, § 2561 n. 88. Utah does not appear to contend that an avulsion has taken place in the change in boundary between statehood and the date of the quitclaim deed, and the Special Master specifically notes that none is involved (R. 10).

IV. ANALYSIS OF THE PARTIES' INTERESTS IN THE GREAT SALT LAKE UP TO THE TIME OF THE GREAT SALT LAKE LANDS ACT REQUIRES THE APPLICATION OF THE DOCTRINE OF RELICTION

The Special Master correctly construed *Bonelli*, *supra*, 414 U.S. at 322–323, 328–329, 331, as requiring an analysis of the "public benefit to be protected" (*id.* at 323) in fixing the boundary (R. 21, 26). That analysis, however, indicates that the application of the doctrine of reliction is completely consistent with the public benefit considered in *Bonelli*. Throughout that opinion, this Court indicated that the public benefit to be protected was the State's interest in safeguarding navigation or related activities. Thus, in *Bonelli*, the State was denied title to exposed lands because the channelization project was not "undertaken to give the State title to the subject lands for the protection of navigation or related public goals" (*Bonelli*, *supra*, at 323). And the Court noted that the State's claim must fail, because "depriving petitioner of the subject land is [not] necessary to any navigational or related purpose" (*id.* at 331).

Similarly, in the present case, the general applicability of the reliction doctrine was necessary for the preservation of Utah's interest in navigation on the

Lake, up to the date of the Act. Indeed, the Special Master, in Conclusion of Law 4 (R. 32), in fact applied the doctrine of reliction to the reinundation which occurred since June 15, 1967, as follows:

> The public benefit of Utah which is entitled to protection has accompanied the reinundation of the bed of the Lake to approximately its extent at statehood.

And this would undoubtedly be correct, were it not for the passage of the Great Salt Lake Lands Act. By accepting that Act, Utah agreed to waive its right to control the Lake for navigational and related purposes to the extent that the Lake might rise above the meanderline, in return for the benefits accruing from a fixed boundary line.

Thus, Representative David S. King, of Utah, at the Febraary 1966 hearings on the Great Salt Lake Lands Act, stated (Ex. P–22, p. 112):

> In that event [the return of the Lake to statehood level] the State of Utah would lose and it is perfectly willing to assume that risk. In other words, in this situation certainty is more important to all parties than the matter of gambling over the gain or loss of new territory. What is most important is that we get the matter settled and the State of Utah would be perfectly willing to hazard the risk of its losing acreage if the water should exceed the meanderline * * *. [Hearings Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, on H.R. 1791 and H.R. 6267, Great Salt Lake Relicted Lands, 89th Cong., 2d Sess., at 112 (1966).]

Contrary to the Master's statement that Congress could have intended Utah to pay for relicted lands only if the 1967 lake level was reasonably stable (R. 26), it was specifically contemplated that the Lake would continue to fluctuate. The Act itself, in Sections 2 and 4, recognizes the possibility of Lake movements both above and below the meanderline. Senator Bennett of Utah specifically stated in floor debate that within 10 years the Lake would rise enough to inundate some 350,000 acres (112 Cong. Rec. 5008) and later stated that he certainly hoped that the area was entering a wet period which would cause the Lake to rise (112 Cong. Rec. 11047). And of course Rep. King's testimony cited above supports the same conclusion. All of Utah's federal legislators supported the final legislation embodying this understanding. See 112 Cong. Rec. 5005, 7505, 7508, 11078–11081.

What we have here, realistically, is a gamble (although a low-risk gamble, as explained *infra*) by Utah that did not pay off. Utah's position has always been that reliction does not apply to the Great Salt Lake and that the State therefore owns all land under water at statehood, which Utah equates with the surveyed meanderline. The State's representatives apparently believed, however, that with the Lake at its very low level of the mid-1960's, a stable boundary and certainty of land titles were more important than a possible victory in litigation on the reliction question. Thus, the Great Salt Lake Lands Act was adopted. If the Lake had fallen further, Utah would have become the free owner of land which otherwise might

have been lost under the doctrine of reliction. Since the Lake has instead risen, Utah may now be required to pay for land which it would have owned without payment, except for the Act. But the outcome of that gamble should not affect the legal determination as to the applicability of the doctrine of reliction up to the date of the quitclaim deed. And as shown above, both the general principles of the doctrine of reliction and Utah's interest in control of navigation required the doctrine to apply until it was made inapplicable by contract.

Moreover, under the Act the ultimate choice lies with Utah. Should our contention prevail in this Court, the State may choose to pay the United States for the lands conveyed in 1967 and thus obtain the fixed boundary thought to be important when the Act was passed, or it may choose instead to retain its rights under the doctrine of reliction. If the State simply refuses to pay the amount ultimately determined to be due to the United States, the conveyance by the United States will be voided and the doctrine of reliction will continue to apply. Great Salt Lake Lands Act, Sec. 5(b), 80 Stat. 193. In that event, Utah would be the owner, without payment, of the lands now beneath the waters of the Great Salt Lake, although it would continue to run the risk of loss in the event of a future fall in the lake.

CONCLUSION

It is therefore respectfully submitted that the United States should be confirmed as the owner, as of June 15, 1967, of such lands adjacent to United States

property as had been exposed by the recession of the ordinary high water mark of the Great Salt Lake between the date of statehood, January 4, 1896, and June 15, 1967.

ROBERT H. BORK,
Solicitor General.
WALLACE H. JOHNSON,
Assistant Attorney General.
DANNY J. BOGGS,
Assistant to the Solicitor General.
JOHN E. LINDSKOLD,
Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 31, ORIGINAL

STATE OF UTAH, PLAINTIFF

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR THE UNITED STATES

The position of the United States in this case rests on two simple propositions: (1) The doctrine of reliction applies to the Great Salt Lake as to all other navigable bodies of water; and (2) the water movements on the Great Salt Lake have been gradual and imperceptible so that under the doctrine of reliction the boundary of the United States as riparian owner has followed the advance and retreat of the water's edge.

In our original brief we indicated how, in our view, the Special Master erred in rejecting the first proposition based on the frequency and rapidity of temporary and seasonal movements on the Lake and in rejecting the second based on his consideration of temporary fluctuations rather than only the movement of the "average yearly stage" of the Lake.

In this reply brief we focus on three points: (1) Utah's mischaracterization of the government's theory of the Lake boundary as a "shooting boundary"; (2) that the errors we find in the Special Master's Report are errors of law and not of fact; and (3) various technical and computational disputes raised by the Utah brief.

1. The United States is relying in this case on the common law principle that seasonal or temporary changes in a riparian boundary do not change the legal boundary. *Alabama* v. *Georgia*, 23 How. 505, 515; *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 625-626. Thus, the succession of high and low tides and the monthly and annual variations in those tides do not constitute a change in an ocean boundary. *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 26-27. Rather, the boundary is established by an averaging of observations over an 18.6 year period, corresponding to a complete cycle of the astronomical phenomena affecting tidal action. *Ibid.* In just the same way, the United States contends, the daily and seasonal variations in the level of the Great Salt Lake do not affect the legal boundary. We contend that these factors may be accounted for in much the same way as in the tidal situation, by taking an average of observations over an annual period. Utah mischaracterizes this contention as creating a "shooting" boundary, which remains fixed except that once each year it "shoots" to the new level.

The United States does not urge such a position, any more than it regards a tidal boundary as remaining fixed for a period of 18.6 years and then "shooting" to a new level based on the levels of a recently completed cycle. Rather, just as in the tidal rule, the legal level at any particular date is the "average yearly stage" (Br. 11; Report 14-15), found by averaging periodic readings over the preceding full period, in this case one year. Utah may have been misled by the circumstance that, in charting the history of the Lake, both sides have generally spoken of a yearly level composed of readings taken over the course of a specified calendar year. Thus, the average of readings taken over the year 1973 would be the legal level for January 1, 1974. If the Lake were

generally to rise during 1974 (although that movement would, of course, fluctuate with daily variations and with the seasonal rise and fall), then the 1974 average (the legal level for January 1, 1975) would be higher. But the level would not instantaneously "shoot" to the higher level on January 1, 1975. It would, instead, rise gradually during the year, each time a new (presumably higher) reading was included in the average and a corresponding older (presumably lower) reading for the previous year was dropped. This again would be exactly analogous to the method of tidal computation.

Thus the method for computing the legal boundary of the Great Salt Lake is fully in accord with precedent, and is a workable method of measuring. It concededly could cause administrative problems not present with an absolutely fixed boundary, and that possibility was, of course, one of the reasons for the passage of the Great Salt Lake Lands Act. But mere administrative difficulties do not abrogate the common law rules of reliction. *United States* v. *Louisiana*, 394 U.S. 1, 5-6.

2. Utah relies heavily on the argument that the Report of the Special Master consists of findings of fact which must be upheld by this Court unless "clearly erroneous," as in the standard established by Rule 52(a), Fed. R. Civ. P. While we disagree that factual findings by a Master appointed by this Court are entitled to such weight (see *Mississippi* v. *Arkansas*, 415 U.S. 289, 291, 292; 296-297, Douglas, J., dissenting), that question has no real relevance here. The essential facts of the characteristics and movement of the Lake are not in dispute, as Utah itself concedes (Utah Br. 8). The dispute arises over the legal significance of these facts, under the common law doctrine of reliction.

An examination of the United States' exceptions to the Master's findings of fact reinforces this conclusion. Exceptions 1 and 2 are essentially technical corrections. Exceptions 3 and 4 are clarifications of certain calculations advanced by the United States. Exceptions 5 through 7 object to "factual" findings which are in reality conclusions that certain undisputed circumstances are not "imperceptible" or "reasonably permanent." This type of conclusion does not rest on any resolution of credibility or other matter which the trier of fact is in a superior position to determine. Instead, these conclusions are essentially interpretations by the Master of the law of reliction, the correctness of which is now at issue for this Court's independent determination.

3. a. In discussing the speed and perceptibility of the movement of the waters along the shoreline of the Great Salt Lake, the United States has contended that (1) the average movement of the legal boundary of the Lake has been about 1½ inches per hour in the period since statehood; and (2) that the movement of that boundary in the flattest portion of the Lake shore, during the time of most extreme change in the Lake level, was about 15 inches per hour. At pages 60-66 of its brief, Utah questions the factual accuracy of these contentions.[1]

It is obvious that any averaging of the Lake's movement over a period of 75 years, over widely varying elevations and different topographical conditions,

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[1]We will not here argue further that the changes on a daily or seasonal basis, on which Utah in part relies (Utah Br. 38-43, 64 n. 2, paras. 1 and 2) do not change the legal boundary, any more than the movements from low to high tide, or the movements of a river during the seasonal periods of drought and flood.

would be only an estimate. Nevertheless, that estimate can be made with reasonable accuracy and does give a realistic view of the magnitude involved. For any given year the average rate of movement can be found by ascertaining (from Exh. P-5) the amount of land exposed or inundated by the change in the Lake level for the year, and then dividing by the shoreline at that elevation. In our example we simply took an average for each of these factors. Since, as noted in our brief (p. 4) and Exh. P-5, the amount of land affected by a given change is greater at the average elevation chosen (4198.5 feet) than either above or below that level, we probably overstate the rate of movement. Utah has chosen to attack the 350-mile average shoreline figure, though without supplying any figure of its own. Contrary to Utah's intimation (Utah Br. 62, n. 1), we are informed by the United States Geological Survey that it has never made an exact measurement of the shoreline of the Lake at any of the possibly relevant contour levels. We are also informed, however, that 350 miles is a reasonable estimate of the shoreline of the lake in the vicinity of its present level.

In any event, even if we concede *arguendo* that the shoreline is, for example, only 300 miles, the average rate of movement becomes only 1.9 inches per hour (see Br. p. 12 and n.7). That certainly does not alter the significance of the figure.

The figure of 15 inches per hour represents the most extreme movement of any part of the boundary during the year of most extreme change in the level of the Lake (Br. 12-13). In addition to its usual argument relying on daily and seasonal changes (Utah Br. 64, n. 2, paras. 1 and 2), Utah challenges the contention that this most extreme movement amounted to only 2.2 miles for the

year (*id.* at para. 3). Our calculations were made directly from Exhibit D-4, showing the actual contour of the Lake at its flattest point. We measured the distance affected by the change from 4196.83 to 4198.69 feet during the year with the greatest change in the Lake level. This is not inconsistent with Mr. Arnow's testimony at page 34 of the hearing transcript, that there are places along the Lake where at some Lake levels 5 feet difference in Lake level would mean "about 7½ miles" of distance along the shore. That testimony did not necessarily mean that a substantial Lake movement actually took place when the Lake was at the level Arnow was discussing.

Moreover, Utah's contention (Utah Br. 64, n. 2, para. 3), based on Mr. Arnow's testimony, that a rise of 1.86 feet at such a point would cause a movement of 2.79 miles at the shoreline, even if credited, would only change the figure for the most extreme movement in the most extreme year to 20 inches per hour (2.79 x 5280 x 12 divided by [365 x 24] = 20.18). This change would require only slight adjustments in the examples used on pages 20-21 of our brief to illustrate that such a movement is imperceptible. This rate of change would be equivalent to the movement of the minute hand on a 3 and 1/6 inch radius alarm clock; the movement of the second hand on a standard government wall clock would be 60 times more rapid than the Lake's movement; and the movement would still be slightly slower than that of the slowest known snail. We submit that even these figures do not constitute the type of rapid and perceptible movement necessary to defeat the application of the doctrine of reliction.

b. At page 70 of its brief Utah disputes our statement (Br. 18) that the land "being reinundated by the present rise in the Lake has been dry for the last 22 to 43 years." As of late May 1974, when the brief was written, the Lake was rising to just over 4201 feet. As shown by Exhibits P-9, P-11 and D-3, since 1931 the Lake has been above 4200 feet only for a brief period in 1952-1953, when it did not quite reach 4201 feet. Thus, depending on exactly where the Lake was on a given day, it was at a level which had not previously been reached in 22 to 43 years, exactly as stated. The significance of this fact is that although the Lake does fluctuate continuously, these minor fluctuations do not override long-term secular trends. Just as a river may gradually move by accretion in one direction and later return, despite momentary counter-movements, so here the Lake moves so that large areas are covered or exposed for years or decades at a time. That is all that is required by the law for a reliction to occur. See cases at Br. 18-20.

c. At pages 86-90, Utah raises certain objections to our discussion of the relation between the "surveyed meander line" and the level of the Lake at statehood. It should be noted that there is only one meander line. Different portions of it were surveyed at different times, beginning in 1855, and it is thus for convenience sometimes referred to as the line of 1855, although the date adds no specificity to the description. Utah contends that what it received at statehood should be measured by the meander line although it concedes that much of the meander line is above the Lake level at statehood (Utah Br. 62). The United States contends that under the Equal Footing doctrine, Utah's ownership at statehood must be measured by the water level at that time. Depending on the outcome here, this question may be resolved in a later stage of litigation.

In any event, the United States had no devious motive in the ellipsis to which Utah objects at pages 87-88.[2] Both parties recognized that by opposing the government's theory of reliction, Utah was denying the right that it would have under that theory to acquire land whenever the water level moved above the boundary of what Utah had received at statehood, whether that is measured by the meander line or by the statehood level.

Finally, Utah attacks our contention that the Master implicitly applied the doctrine of reliction in stating that "[t]he public benefit of Utah * * * has accompanied the reinundation of the bed of the Lake to approximately its extent at statehood" (Br. 23). We base this statement on two grounds. First, if reliction simply did not apply, and Utah's ownership had remained constant since statehood, why would its public benefit have changed at all? If it is to "accompany" the waters it must be because some incident of title also accompanies them. Second, the Master gives no indication that this "public benefit" will cease to "accompany" the waters if they rise above the statehood level (government's theory) or even the meander line (Utah's theory).[3] This could only be so if Utah's ownership were to continue to expand because of the rise of the Lake, and that could only be by means of the doctrine of reliction.

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[2]A comparison of the quotations at pages 87 and 88 shows that our ellipsis removed not simply the two words "of 1855," but the entire (and redundant) phrase, "or go beyond the meander line of 1855."

[3]We note that in some places the water has already risen above the meander line, because in a few places that line was surveyed when the Lake was below statehood level. See, *e.g.*, Section 8 of Township 6 North, Range 9 West on Exhibit D-2 (south and slightly west of Gunnison Island).

CONCLUSION

For the reasons stated herein and in our original brief, it is respectfully submitted that the United States should be confirmed as the owner, as of June 15, 1967, of such lands adjacent to United States property as had been exposed by the recession of the ordinary high water mark of the Great Salt Lake between the date of statehood, January 4, 1896, and June 15, 1967.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

DANNY J. BOGGS,
Assistant to the Solicitor General.

JOHN E. LINDSKOLD,
Attorney.

DECEMBER 1974.

DOJ-1974-12

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 31, Orig.

State of Utah, Plaintiff,
v.
United States.

On Exceptions to Report of Special Master.

[February 19, 1975]

PER CURIAM.

We heard oral argument upon the Exceptions to the Report of the Special Master filed by the United States. 419 U. S. — (1974). We overrule the Exceptions and adopt, and direct the entry of, the Decree proposed by the Special Master except that, as agreed by the parties, Paragraph No. 1 of the proposed Decree is modified in form by revising the phrasing of the opening paragraph to read as follows:

> "1. Subject to any federal regulatory authority that may extend to the Great Salt Lake or its shorelands, the United States of America, its departments and agencies, are enjoined from asserting against the State of Utah any claim of right, title and interest:"

Further, Finding of Fact No. 10 is adjusted, as agreed by the parties, by inserting 4200.8 in lieu of 4200.2, and by inserting 396,000 in lieu of 325,000.

For the purpose of giving effect to the above, the following decree is hereby entered.

It is ordered, adjudged and decreed that:

> "1. Subject to any federal regulatory authority that may extend to the Great Salt Lake or its shorelands, the United States of America, its departments

and agencies, are enjoined from asserting against the State of Utah any claim of right, title and interest:

(a) to any of the exposed shorelands situated between the edge of the waters of the Great Salt Lake on June 15, 1967, and the bed of the Lake on January 4, 1896, when Utah became a State, with the exception of any lands within the Bear River Migratory Bird Refuge and the Weber Basin federal reclamation project;

"(b) to the natural resources and living organisms in or beneath any of the exposed shorelands of the Great Salt Lake delineated in (a) above; and

"(c) to the natural resources and living organisms either within the waters of the Great Salt Lake, or extracted therefrom, as delineated in (a) above.

"2. The State of Utah is not required to pay the United States, through the Secretary of the Interior, for the exposed shorelands, including any minerals, delineated in paragraph 1 above of this decree.

"3. There remains the question whether any lands within the meander line of the Great Salt Lake (as duly surveyed prior to or in accordance with section 1 of the Act of June 3, 1966, 80 Stat. 192), and conveyed by quitclaim deed to the State of Utah, included any federally owned uplands above the bed of the Lake on the date of statehood (January 4, 1896) which the United States still owned prior to the conveyance to Utah.* In the absence of agreement between the parties disposing of the above question or of the necessity for further proceedings with respect thereto, the Special Master is directed to hold such hearings, take such evidence, and conduct such proceedings with respect to that question

*As appears from p. 4 of the Special Master's Report the parties have reserved their position with respect to this question.

as he deems appropriate and, in due course, to report his recommendations to the Court.

"4. The prayer of the United States of America in its answer to the State of Utah's Complaint that this Court 'confirm, declare and establish that the United States is the owner of all right, title and interest in all of the lands described in Section 2 of the Act of June 3, 1966, 80 Stat. 192, as amended by the Act of August 23, 1966, 80 Stat. 349, and that the State of Utah is without any right, title or interest in such lands, save for the right to have these lands conveyed to it by the United States, and to pay for them, in accordance with the provisions of the Act of June 3, 1966, as amended,' is denied."

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.